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A constitutional analysis of multijurisdictional conflicts in the EU legal order confirms that diversity is possible in EU competition law

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A constitutional analysis of
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order confirms that diversity is possible in EU
competition law

PhD

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Abstract

Is diversity in European Union (EU) competition law possible from a constitutional point of view? This question has become even more contentious after the Treaty of Lisbon. Under Article 3(1)(b) TFEU, establishing the competition rules necessary for the functioning of the internal market is within the exclusive competence of the Union. Under Article 2(1) TFEU, when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or when implementing Union acts. The exclusive nature of the Union's competence in the area of competition is controversial. The majority of the authors criticise the policy choice of EU exclusive competence, but seem to accept that diversity in EU competition law is excluded under the Treaties. This thesis, however, challenges that conclusion.

First it is submitted that EU system of competences as introduced by the Treaty of Lisbon the competence to legislate on substantive principles of EU competition law remained shared. It will be seen that under this system, Article 3(1)(b) TFEU excludes much more than it includes. Secondly, it is showed that the principles of direct effect,, primacy of EU law and the fundamental principle of *ne bis in id* allow for diversity in EU competition law. These principles certainly have the potential to affect Member States' sphere of competence. However, it will be seen that they do not exclude Member States' competence in the area of competition. On the contrary, diversity in European Union competition law is allowed. There are nonetheless several bottlenecks to the recognition of this diversity that should be removed, and some other potential obstacles that should be avoided. This thesis does not ask the question of whether diversity in EU competition law is desirable, and it also does not discuss the limits to the application of divergent national competition laws stemming from

the internal market freedoms. These questions complete the picture of the scope for diversity in EU competition law and are identified as avenues for future research work.

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Preface

The research question: Is diversity in EU competition law possible from a constitutional point of view?

There is an overwhelming support for uniformity in EU competition law.¹ Uniformity in EU competition law is not however straight forward from a policy point of view. As expressed by Monti, “[t]he body of rules we call ‘competition law’, and each decision reached, reflects a particular vision of what competition law is designed to do, or a compromise, which reflects the tensions among law makers as to the purposes of a particular rule.”² Moreover, “[e]nforcers have diverging policy preferences, and different economic theories can be used to justify diametrically opposed conclusions as to the legality of a given practice.”³ Townley, also, points out that “competition assessments are riddled with value judgements (about goals, methods, procedures and institutional structures). Different Member States and (and their citizens) have different opinions on the appropriate balance between competing values.”⁴ If these views are correct, the existence of divergence in EU competition law and policy is unavoidable and mirrors the conflictual dynamics of EU law.

Supporters of uniformity in EU competition law argue in favour of a harmonised solution for divergent views i.e. the harmonised enforcement of EU competition law and uniform national competition laws. They generally present the following major arguments in favour of uniformity: it reduces business costs, enhances legal certainty and fosters integration of the internal market and, in any case, the competence in the area of competition is exclusive

¹ See Christopher Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)' in Piet Eeckhout and Takis Tridimas (eds), *Yearbook of European Law*, vol 33 (Oxford University Press 2014).

² Giorgio Monti, *EU Competition Law* (Cambridge University Press 2009), 3.

³ *Ibid*, ix.

⁴ Christopher Townley, 'The EU Constitutional Order and Competition Law', *Draft manuscript with the autho* (2018), 1.

to the Union under Article 3(1)(b) TFEU.⁵ Supporters of diversity, on the other hand argue that diversity is both inevitable and desirable: for example, allowing different views to prevail in EU competition law enhances the legitimacy of decisions and increases the chances for better regulation through experimentation and innovation, which will in due course improve the quality of decisions.⁶

This thesis asks a more fundamental question: whether diversity in EU competition law is possible from a constitutional point of view? This thesis does not ask whether diversity in EU competition law is desirable, and it also does not discuss how far the application of divergent national competition laws goes against internal market freedoms. The constitutional analysis, however is the foundation upon which all other policy arguments must rest. The research question breaks down further into three sub-questions: (i) is the application of national competition law possible?; (ii) are Member States able to give their own interpretation of EU competition law even if it risks diverging from the approach favoured by the Commission?; (iii) how do the general principles of EU law limit diversity in EU competition law?

A constitutional approach to diversity in EU competition law requires an analysis of competence allocation in the EU. Multijurisdictional competence allocation sets the jurisdictional boundaries of the Union and of the Member States. The Treaty of Lisbon subdivided the Union's competences into exclusive and non-exclusive competences. Where the EU has exclusive competence, Member States may act only if empowered by the Union or when implementing an act of the Union. However, if a competence is non-exclusive, the competence of the Member States is not suppressed in those areas.

⁵ Larry E. Ribstein and Bruce H. Kobayashi, 'An Economic Analysis of Uniform State Law' (1996) 25 *The Journal of Legal Studies* 131.

⁶ Steven G. Calabresi, 'A government of limited and enumerated powers': in defense of *United States v. Lopez* (Reflections on *United States v. Lopez*)' (1995) 94 *Michigan Law Review* ; Charles Tiebout, 'A Pure Theory of Local Expenditures' (1956) 64 *The Journal of Political Economy* .

Academic literature seems to acquiesce in the proposition that the Treaty of Lisbon has consecrated an exclusive competence of the EU in the field of competition, as per Article 3(1)(b) TFEU, even though this article is considered controversial by the majority of the commentators.⁷ If correct, that would be a crucial limitation on the Member States' capacity to legislate on competition matters and to enforce EU competition law, since under Article 2(1) TFEU, in areas of exclusive competence of the Union, Member States are not free to act. Yet, empirical observation reveals a different reality. The daily life of a national competition authority does not reflect exclusiveness of EU competence in the field of competition. National competition authorities still enforce both EU and national competition laws, Council Regulation (EC) No 1/2003 on the implementation of the rules on competition law laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003)⁸ has not been abolished, and national competition laws keep evolving and reforming, notably under the auspices of the European Commission.⁹ Moreover, when enforcing EU competition laws, Member States continue to give their own interpretation of EU competition law, with not much interference from the EU, as showed by the Booking.com cases discussed below. That has an impact on the uniformity of the enforcement of EU competition law. There is, in effect, a mismatch between the reality and what would be expected if the EU had exclusive competence in the

⁷ See Alan Dashwood, 'The relationship between Member States and the European Union/European Community' (2004) 41 Common Market Law Review ; Giorgio Monti, 'Legislative and Executive Competence in Competition Law' in Loïc Azoulay (ed), *The question of competence in the European Union* (Oxford University Press 2014); Lucia Serena Rossi, 'Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and Member States?' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law After Lisbon* (Oxford University Press 2012); Robert Schütze, 'From Rome to Lisbon: Executive federalism in the (new) European Union' (2010) 47 Common Market Law Review ; Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)'.

⁸ Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003) [2003] OJ L 1/1.

⁹ The Economic Adjustment Programmes for Greece, Ireland (2010) and for Portugal (2012) signed between these Member States and the European Commission, International Monetary Fund and European Central Bank contained commitments to introduce changes on the national competition laws and on the national competition law enforcement system. Programmes available at: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance_en.

field of competition. This itself poses a challenge to the received wisdom that the field of competition has become the exclusive competence to the EU under the Treaty of Lisbon.

To address the research question, it is necessary to consider EU primary and secondary law, national constitutional law and national competition laws, case law of the CJEU as well as national courts. Also, preparatory documents of EU primary and secondary law and communications of the Commission on its interpretation of EU competition law as well as documents of the European Competition Network are useful sources. Finally, specialised academic literature on EU primary and secondary law, particularly regarding the system of EU competences introduced by the Treaty of Lisbon and the enforcement of EU competition law is of great interest to understand the context and the state of the debate on the matter.

The debate on diversity in EU competition law is not only of a pure academic interest. A uniform enforcement of EU competition law may not produce the desired results at Member States' level and a diversify approach may be justified. Two cases illustrate this well. First the uniform approach to multilateral interchange fees following MasterCard¹⁰ and Visa¹¹ cases, that is deemed to have solidified the market shares of Visa and Mastercard in some national markets not allowing for new entrants in the market. Second the diverse approach to Online Travel Agents parity clauses in what are known as the "Booking" cases, that was considered necessary to protect competition in some national markets.

The uniform approach to multilateral interchange fees (MIF)

In 2007, the Commission issued a decision against MasterCard MIFs applicable to cross-border payment card transactions with MasterCard and Maestro consumer debit and credit cards in the European Economic Area (EEA). The Commission found that MasterCard's MIFs restricted competition between acquiring banks leading to higher costs of card acceptance

¹⁰ *MasterCard Case* (Case COMP/34.579), Commission Decision C(2007) 6474, OJ C 264/8.

¹¹ *Visa MIF* (Case AT.39398), Commission Decision C(2014) 1199 final, OJ C147/6.

by retailers, in violation of Article 101 TFEU. The decision that MIFs were incompatible with Article 101 TFEU and thus should be removed, was received with high criticisms both by the industry¹² and academics¹³ that argued *inter alia*, that considering MIFs as restrictive agreements prohibited under Article 101 TFEU risked the operability and sustainability of payment cards schemes.¹⁴ Economic theory on two-sided markets supported the existence of an interchange fee as necessary to the functioning of four party payment scheme such as MasterCard and Visa.¹⁵

In 2009 amid strong controversy on the implementation of a 0% MIF following the MasterCard decision, the Commissioner for Competition, Neelie Kroes, reached a provisional agreement with MasterCard to reduce to 0.30% the maximum weighted average cross border MIF per transaction for consumer credit cards and to 0.20% for consumer debit cards.

¹⁶ The same level of MIFs was accepted by the Commission in a parallel case against VISA, where the Commission adopted a commitment decision.¹⁷

¹² European Payments Council, 'Cross-border Interchange Fees: Why the General Court Got it Wrong in the MasterCard v. Commission Case' accessed 10 March 2018, available at:

<https://www.europeanpaymentscouncil.eu/news-insights/insight/cross-border-interchange-fees-why-general-court-got-it-wrong-mastercard-v>

¹³ E.g.: David S. Evans and Richard Schmalensee, *Paying with Plastic: the Digital Revolution in Buying and Borrowing* (MIT Press 2005); Stuart E. Weiner and Julian Wright, 'Interchange Fees in Various Countries: Developments and Determinants' (Interchange Fees in Credit and Debit Card Industries: What Role for Public Authorities?); David S. Evans, 'The Economic and Regulation of What Merchants Pay for Cards' (2011) Competition Policy International .

¹⁴ "Through the fallback MIF, MasterCard balances the interests of both cardholders and merchants so that each party pays its fair share of the costs for the benefits it receives. The fallback MIF provides compensation to issuers for the benefits they provide to merchants, such as guaranteed payment (i.e. guarantee against fraud and against cardholder default). Without the fallback MIF, the balance of interests between merchants and cardholders would be upset and tipped against cardholders who would have to pay the costs of services provided to merchants." See European Payments Council <https://www.europeanpaymentscouncil.eu/news-insights/insight/cross-border-interchange-fees-why-general-court-got-it-wrong-mastercard-v>.

¹⁵ For a general discussion see OECD - Directorate for Financial and Enterprise Affairs, Competition Committee Policy Round Table on Two sided-markets, 2009, DAF/COMP(2009)20, available at: <https://www.oecd.org/daf/competition/44445730.pdf>

¹⁶ IP/09/515, 1 April 2009.

¹⁷ Commission decision of 26 February 2015, Case AT.39398 Visa MIF.

The investigations of the Commission in both MasterCard and Visa cases left space for the enforcement of EU competition law by the Member States regarding domestic MIFs. Some competition authorities, in particular the Portuguese competition authority, feared that the level of fees considered appropriate by the Commission under Article 101 TFEU were not adequate in the national context. Empirical evidence supported by statistical data from the Central Bank of Portugal was against a 0% MIF as in the original 2007 MasterCard decision. Even a 0,2% MIF for debit cards and 0,3% MIF for debit cards under the commitments decisions were not sufficient for the banks in Portugal to cover the costs of operating card payments schemes.¹⁸ Economic evidence revealed that a minimum 0,9% average MIF was necessary for the business model to continue.¹⁹ The level of MIFs allowed under the Commission's commitment decision were not high enough to create an incentive for new entrants in some national markets.

The possibility however, for the recognition of national specificities in the enforcement of EU competition law at national level, was very limited as there was strong pressure from the Commission, including the creation of the ECN "Banking and payments subgroup of the European Competition Network," to secure a uniform enforcement of Article 101 TFEU regarding domestic interchange fees by the national competition authorities.²⁰ Yet, uniform MIFs across the EU were not in accordance with the different realities of national markets and was too restrictive to allow new entrants in the market. In Portugal a project for a domestic payment cards scheme was known to have been abandoned because the allowed MIFs levels were too low. This contributed to the solidification of MasterCard and Visa

¹⁸ See the report from the Portuguese Central Bank, *Retail Payment Instruments in Portugal: Costs and Benefits*, July 2007.

¹⁹ Ibid, Table II.17, p. 69.

²⁰ The ECN Subgroup Banking and Payments published an Information Paper on Competition Enforcement in the Payment Sector, March 2012, available at: http://ec.europa.eu/competition/sectors/financial_services/information_paper_payments_en.pdf

market shares, and was exactly contrary to the objective of encouraging more competition in the market.

The diversified approach to Online Travel Agents (OTA) parity clauses

Online hotel bookings have been formally investigated by several national competition authorities in simultaneous.²¹ A key issue of the investigation is whether obligations on hotels to make their best prices available (“MFNs”) to Online Travel agent (“OTA”) platforms are anti-competitive.

There are typically two kinds of parity clauses, ‘wide’ and ‘narrow’. The “‘wide’ parity clauses oblige hotels to give the OTA the lowest room prices and best room availability relative to all other sales channels, whereas ‘narrow’ parity clauses allow the hotel to offer lower room prices and better room availability on other OTAs and on offline sales channels, but still allows the OTA to stop the hotel from publishing lower room prices on the hotel’s own website.”²²

The French, Italian and Swedish NCAs were appointed by the European Competition Network to take the joint lead with the understanding that other NCAs would not duplicate their activities, but would be informed and have an opportunity to contribute to the process. A working group was established open to all interested NCAs whose activities were coordinated by the European Commission through the ECN. In 2015 the French, Italian and Swedish NCAs accepted identical commitments from Booking.com to settle their investigations. These commitments “[...]eliminate wide price parity clauses across all European markets (including the UK), but [...] allow them to retain narrow clauses.”²³

²¹ Belgian, Czech, French, German, Hungarian, Irish, Italian, Dutch, Swedish and UK National Competition Authorities.

²² CMA, *Online travel agents: monitoring of pricing practices results* (2017).

²³ House of Lords Select Committee on the European Union, *Online Platforms and the Digital Single Market, Chapter 5: Competition and online platforms* (2016), paragraph 111.

The German NCA, the Bundeskartellamt, was also investigating the same type of clauses used by Booking.com. However, it did not follow the other three NCAs approach. The Bundeskartellamt rejected exactly the same commitments accepted by the three NCAs,²⁴ and prohibited Booking (Booking.com Deutschland GmbH, Berlin, and Booking.com B.V., Amsterdam) from continuing to apply its 'best price' clauses and ordered the hotel booking portal to completely delete the clauses from its contracts and general terms and conditions by 31 January 2016 as far as they affect hotels in Germany.²⁵ As explained by Andreas Mundt, President of the Bundeskartellamt:

*"These so-called narrow best price clauses also restrict both competition between the existing portals and competition between the hotels themselves. Firstly they infringe the hotels' freedom to set prices on their own online sales channels. There is little incentive for a hotel to reduce its prices on a hotel booking portal if at the same time it has to display higher prices for its own online sales. Secondly, it still makes the market entry of new platform providers considerably difficult. The 'best price' clauses barely provide an incentive for the hotels to offer their rooms on a new portal cheaper if they cannot implement these price reductions on their own websites as well. There is no apparent benefit for the consumer."*²⁶

The Bundeskartellamt defended its position by arguing that a uniform enforcement would not take into account the different context of the German market that makes it necessary to prohibit the narrow parity clause in Germany:

*"While we are of course working with our European neighbours to ensure uniformity, here we are talking about different national markets with different market conditions. In addition, different tools were used by the authorities. There is no inconsistency."*²⁷

²⁴ See Bundeskartellamt press release from 2 April 2015: "The Bundeskartellamt's statement of objections gives Booking.com the opportunity to review its position on the issue. In line with the Düsseldorf Higher Regional Court's decision in the parallel proceedings against HRS the Bundeskartellamt regards Booking's proposals for a compromise as insufficient."

²⁵ See Bundeskartellamt press release from 23 December 2015: "Narrow 'best price' clauses of Booking also anticompetitive."

²⁶ Idem.

²⁷ Spokesperson for the Bundeskartellamt, as quoted in the Global Competition Review, Tuesday 21 April 2015.

Meanwhile, and contrary to the commitments accepted by the French competition authority under EU competition law, the French Parliament has since gone further and banned narrow parity clauses too, in order to protect Small and Medium Enterprises.²⁸

The divergences on the approach in the Booking.com cases is well illustrated in the “Report on the monitoring exercise carried out in the online hotel booking sector by EU Competition Authorities In 2016”²⁹:

[...] it should be recalled that since 2010 several national competition authorities ('NCAs') have investigated OTA parity clauses,³⁰ and that these NCAs have adopted differing approaches. Germany's Bundeskartellamt has pursued a prohibition approach, whereas the French, Italian and Swedish NCAs pursued a commitments approach.^{31,32} The Bundeskartellamt prohibited the parity clause used by HRS (a major German OTA) in December 2013. In April 2015, Booking.com committed to the French, Italian and Swedish competition authorities to change its 'wide' parity clause to a 'narrow' parity clause.³³ Booking decided to apply this change EU-wide from July 2015, and Expedia also decided to apply a narrow parity clause EU-wide, from August 2015. In December 2015, the Bundeskartellamt prohibited Booking.com's narrow parity clause in Germany.^{34,35} In addition to these antitrust measures, in France, in August 2015, the so-called Loi Macron³⁶ rendered null and void all OTA price parity clauses and, in Austria, in November 2016, all OTA parity

²⁸ Eversheds Sutherland International, 'France - Macron Law: A Focus on Online Hotel Reservation Platforms' 2015)

<https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Competition_EU_and_Regulatory/MACRON_LAW_FRANCE> accessed 31 May 2018

²⁹ The Participating Authorities are the Belgian, Czech, French, German, Hungarian, Irish, Italian, Dutch, Swedish and UK National Competition Authorities and DG Comp, available at: http://ec.europa.eu/competition/ecr/hotel_monitoring_report_en.pdf

³⁰ Also known as 'Most Favoured Nation' or 'MFN' clauses.

³¹ The OFT (now CMA) also investigated the online hotel booking sector between 2010 and 2014, though its case focussed not on OTA parity clauses but on restrictions on the ability of OTAs to offer discounted room prices.

³² The Irish NCA also subsequently accepted commitments from Booking.com modelled on those agreed by the French, Italian and Swedish NCAs.

³³ In brief, 'wide' parity clauses oblige the hotel to give the OTA the lowest room prices and best room availability relative to all other sales channels, whereas 'narrow' parity clauses allow the hotel to offer lower room prices and better room availability on other OTAs and on offline sales channels, but allow the OTA to stop the hotel from publishing lower room prices on the hotel's own website.

³⁴ Booking.com's appeal against the prohibition decision is pending before the German courts.

³⁵ Expedia continues to apply its narrow parity clause in Germany. The Bundeskartellamt's investigation of Expedia's clause continues.

³⁶ Article 133 of the *Loi no 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques*.

clauses were rendered null and void by an amendment to the law on unfair competition.^{37,38}

Although commentators claimed that the diverse approaches created uncertainty for business and consumers,³⁹ the Commission did not intervene to avoid what some authors classified as a “real risk of an inconsistent application of European law.”⁴⁰ The Bundeskartellamt claim that a diverse approach to OTA was needed to take into consideration the diversity of different national markets realities, such as the German market, as well as the French Parliament’s wider public policy concerns , regarding the impact on small hotel businesses were respected.

Overview of the thesis

This thesis examines and explains both the existence, and the limits, to diversity in EU competition law from a constitutional point of view.

Chapter 1 establishes the need to discuss diversity in EU competition law, despite the overwhelming support for uniformity. It elaborates on the conflictual dynamic of EU law in general and EU competition law in particular. This chapter distinguishes within the literature the different types of conflicts in EU competition law that can occur and asks whether conflicts in EU competition law are inevitable. The chapter takes the view that, indeed, conflicts are inherent in the application of EU competition law, because of the very diversity that exists within the EU, not only as regards differences in economic structures and legal

³⁷ *Bundesgesetz: Änderung des Bundesgesetzes gegen den unlauteren Wettbewerb 1984 – UWG und des Preisauszeichnungsgesetzes.*

³⁸ Similar legislation is being debated in the Italian parliament.

³⁹ Written evidence from Skyscanner Limited (OPL0006). From “Online Platforms and the Digital Single Market, Chapter 5: Competition and Online Platforms” paragraph 114. Matthew Newman, 'Booking.com, Expedia and Others Escape Formal Probe in Poland' *MLex* (3 November 2015). See also, Philippe Chappatte and Helen Townley, *Online Hotel Bookings - A Joint European Approach or a Most Favoured Nation?* (Briefing May 2015, 2015), 3.

⁴⁰ Chappatte and Townley, *Online Hotel Bookings - A Joint European Approach or a Most Favoured Nation?*, 1.

systems but also as a result of a range of views of the proper function of competition law, which may vary between Member States and economic sectors. In other words, heterogeneity in the EU makes conflicts unavoidable. However, if diversity gives rise to conflicts, diversity is itself a potential solution, if the applicable constitutional arrangements allow for more than one decision maker, and leave open the possibility of more than one outcome, for example through differentiating national laws, and differences in the application and interpretation of national and EU competition law. This is why it is essential to analyse the fundamental constitutional issue of how far such diversity is in fact possible under the allocation of competences in EU law. This issue is explored in the following chapters.

Chapter 2 reviews the academic literature on competence allocation in the field of EU competition law. It offers a framework of analysis of the system of competences introduced by the Treaty of Lisbon. This chapter serves to show that the existing literature does not provide a conclusive answer on the nature of the competence of the EU in the field of competition. It is not enough to accept that competence in this field is exclusive under Article 3(1)(b) TFEU. A further analysis of the scope of the exclusive competence of the EU under Article 3(1)(b) TFEU is needed. Only then do we know the extent to which the competence of the Member States in that area has been excluded.

The question of the extent of the exclusive competence of the EU in the field of competition is examined in chapters 3 and 4, which should be read together. Both chapters explore the boundaries of the exclusive competence of the EU in the field of competition under Article 3(1)(b) TFEU. These chapters explain why Article 3(1)(b) TFEU excludes more from the scope of EU exclusive competence in the field of competition than it includes, and why the executive competence to enforce EU competition law and the legislative competence to establish substantive principles of competition law has remained shared with the Member

States under the Treaty of Lisbon. These chapters constitute the heart of the contribution this thesis makes to the debate on the nature of EU competence in the field of competition and thus to the debate of diversity in EU competition law.

This debate would not be complete though, without a discussion of the limits which general principles of EU law impose on diversity in EU competition law. This issue is dealt with in Chapter 5, which discusses the limits to diversity in EU competition law resulting from the general principles of direct effect and the primacy of EU law, and from the principle of *ne bis in idem*, enshrined at the EU Charter of Fundamental Rights. In particular, Chapter 5 explores the degree of discretion allowed by the principle of direct effect as regards the enforcement of EU competition law, and the theories of pre-emption that govern how conflicts between national and EU competition laws are adjudicated by the Court of Justice of the European Union (CJEU). It explains why diversity in EU competition law is not anathema either to the principle of direct effect or to the primacy of EU law. This chapter also undertakes an analysis of *ne bis in idem* in the context of competence allocation under the Treaty of Lisbon, and argues that this principle does not preclude the parallel enforcement of national and EU competition laws and thus does not exclude diversity in EU competition law.

Chapter 6 then concludes, that there is a strong case for diversity in EU competition law from a constitutional point of view. The chapter identifies unlawful bottlenecks to diversity that ought to be abolished or avoided, and proposes measures to achieve more diversity in EU competition law within the constitutional limits that have been set.

Whether diversity in EU competition law is desirable or not is a policy choice that can be discussed within the constitutional limits identified in this thesis. This policy consideration is not the object of this thesis and remains an area for future research endeavours.

Chapter 1 - The conflictual dynamics of EU competition law

In 1970, Pierre Pescatore declared the law of the EU as “the law of solidarity and integration.” He argued that it was distinct from international law, as the latter is characterized by an “absence of solidarity” that makes international law fundamentally a law of conflicts, equilibrium and co-ordination.” In comparison if “[c]o-ordination [...] is based on the hidden premise that national interest prevails at every stage and, especially in the last resort, over all other considerations, [integration] presupposes the establishment of a common interest between two or more States in an essential area, such as security or economic affairs, and it is brought into being by the organisation of inter-State relation on the basis of an attitude of solidarity in such a way that the safeguarding of the over-all interest prevails over motives drawn from the defence of national interest.” Though integration through law has been the “operational code” of Europe,⁴¹ as “the only tool and the only weapon of the Union is the law it establishes,”⁴² the view of EU law as “the law of solidarity and integration”⁴³ seems to underestimate the impact of the increase heterogeneity in the EU membership, as well as the role of the competing interests which shape legal integration.⁴⁴ As argued by Chalmers

⁴¹ Giandomenico Majone, *Europe as the Would-be World Power: The EU at Fifty* (Cambridge University Press 2010) 1.

⁴² Walter Hallstein introduced the concept of *Rechtsgemeinschaft* that was later enshrined by the Court in the Judgement of 23 April 1986, *Les Verts v Parliament*, Case 294/83, EU:C:1986:166, at 1339. See Walter Hallstein, 'Europäische Redes' in T. Oppermann (ed), *European Speeches of Walter Hallstein* (Deutsche Verl.-Anst 1979) .

⁴³ Pierre Pescatore, 'International Law and Community Law - A Comparative Analysis ' (1970) 7 Common Market Law Review .

⁴⁴ Recent sovereign debt crises combined with the refugee crisis have been testing the limits of solidarity between Member States and EU integration. Weiler speaks about “some of the uglier manifestations of European ‘solidarity’” as regards the sovereign debt crises or “the near abandonment of Italy to deal with the influx of migrants from North Africa as if this was an Italian problem and not a problem for Europe as a whole.” Chalmers argues that the EU and intense conflict have become conjoined. J.H.H. Weiler, '60 Years since the First European Community—Reflections on Political Messianism' (2011) 22 European Journal of International Law ; Damian Chalmers, 'Introduction: The Conflicts of EU Law and the Conflicts in EU Law' (2012) 18 European Law Journal .

the EU and intense conflict have become conjoined.⁴⁵ Where conflictual views exist there may be space for diversity through the differentiating national laws or different interpretation of the EU law.

This chapter discusses the conflictual dynamics of EU law in general (Section 1) and of EU competition law in particular (Section 2). It explores the relevance of conflicts for the debate on diversity in EU competition law (section 3) and makes a short reflection on the value of diversity in EU law (section 4).

1. The conflictual dynamics of the EU law

Throughout EU history, law and integration have been interconnected in what Shaw calls the “common sense view about Europe and its law.”⁴⁶ Dagtoglou claims that EU law is important as a unifying factor, especially because not only the Member States, but also individuals, have been recognised as directly subject to that law.⁴⁷

Against this view, Shaw argues that the focus of the EU on integration creates division.⁴⁸ If, on the one hand, integration brings parties closer together, on the other hand it excludes all the other parties that are not part of this process, creating an exclusionary counter-dynamic. De Búrca and Scott pointed out that increased heterogeneity, political, economic and cultural inevitably brings an increase in the heterogeneity within the functioning of the EU’s institutions and policies.⁴⁹ This increases the counter-dynamic effect of integration in the EU legal order. Governments need to respond to their citizens’ necessities and preferences.

⁴⁵ Chalmers, 'Introduction: The Conflicts of EU Law and the Conflicts in EU Law'.

⁴⁶ Jo Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic' (1996) 16 *Oxford journal of legal studies*, 232.

⁴⁷ P. D. Dagtoglou, 'The Legal Nature of the European Community' in Commission of European Communities (ed), *Thirty Years of Community Law* (1981), 40.

⁴⁸ Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic'.

⁴⁹ Gráinne de Búrca and Joanne Scott, 'Introduction' in Gráinne de Búrca and Joanne Scott (eds), *Constitutional Change in the EU from Uniformity to Flexibility?* (Hart 2000), 2.

They vary in space - different Member States may have different priorities and concerns, and in time - the pro-tempore character of democracy is translated into political cycles that emerge from periodical elections.⁵⁰ Depending on the political, social, economic and even international cycle, what is a concern of a state at a certain time may not be a concern at a different time. In the EU context different political cycles coexist.⁵¹ Furthermore, as observed by Wils, integration is only partial as it is only one of the specific concerns of the Treaty, and only one amongst society's many objectives with which it needs to be reconciled.⁵² Given competence allocation between the EU and the Member States, the responses to functionally interdependent problems often require a coordination of different, semi-autonomous levels of governance.⁵³ This increases the possibility of conflict between different policies enacted at different jurisdictional levels, as competence to regulate different aspects of a problem may be located at different governmental levels.

Adding to this, we have been assisting in the EU to what European scholars call the "rematerialisation" of the law, i.e. a trend to use the law as an instrument of purposive, goal oriented interventions. They associate this to the rise of the welfare state.⁵⁴ Such a shift represents what Teubner calls a "change in norm rationality" triggered by a "change in the functions that the law fulfils:"

"A formal rational system creates and applies a body of universal rules, and formal law relies on a body of legal professionals who employ peculiarly legal reasoning to solve specific conflicts. With the coming of the welfare and regulatory state, greater stress has been placed on substantive rational law, i.e., on law used as an instrument for purposive, goal-oriented interventions. Since substantively rational law is designed to achieve specific goals in concrete situations, it tends to be more

⁵⁰ Juan J. Linz, 'Democracy's Time Constraints' (1998) 19 International Political Science Review .

⁵¹ For example, governments lead by anti-austerity parties such as the Greek Syriza and the Portuguese Socialist party co-exist with pro-austerity Governments such as the German government lead by CDU-CSU and FDP coalition and the Finnish Government lead by the Centre, Finns and National Coalition parties.

⁵² Wouter P. J. Wils, 'The search for the rule in Article 30 EEC: much ado about nothing?' (1993) 18 European Law Review .

⁵³ Ibid.

⁵⁴ For a general discussion see Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 Modern Law, Law Society Review , 239.

general and open-ended, yet at the same time more particularistic, than classical formal law.”⁵⁵ (References omitted)

EU law has also been subject to this phenomenon of rematerialisation. If, in 1957, the Treaty of Rome was predominately “market oriented”⁵⁶ and structured so as to lay down core concepts such as free movement, and undistorted competition,⁵⁷ in 2007, the Treaty on European Union (TEU), signed at Lisbon focused on non-economic goals to a greater extent than the previous Treaties,⁵⁸ The original mainly non-economic objectives of the EU⁵⁹ were amended to include objectives such as “economic and social cohesion”, “environmental protection”, “non-inflationary growth” and a high level of employment and social protection.” The Treaty of Amsterdam⁶⁰ included further objectives such as “promoting quality between men and women”, and “a high degree of competitiveness and convergence of economic performance” and also enlarged the existent objectives of sustainable growth and protection of environment.

The Treaty of Lisbon went further. The introductory title of the TEU – Title I “Common Provisions” contemplates a set of values of the EU pursuant to Article 2 of the TEU:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

⁵⁵ Ibid

⁵⁶ Manfred E. Streit and Werner Mussler, 'European economic and social constitutionalism after the Treaty of Lisbon' in Francis Snyder (ed), *Constitutional Dimensions of European Economic Integration* (Kluwer Law International 1996).

⁵⁷ See in this sense Paul Craig, 'Competence and Member State Autonomy: Casuality, Consequence and Legitimacy' (2009) Oxford Legal Studies Research Paper No 57/2009

⁵⁸ Koen Lenaerts and others, *European Union Law* (3rd edn, Sweet & Maxwell 2011), 107.

⁵⁹ Under Article 2 EC Treaty the Community's objectives were “to promote through the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it.”

⁶⁰ Article 2 Treaty Establishing the European Community (EC Treaty).

It also introduced an extended list of objectives set in Article 3 TEU.⁶¹ The objectives as set out in Article 3 TEU have to be complemented by horizontal objectives laid down in “provisions of general application” of Title II of the TFEU, which the EU must take into account in the implementation of its policies.⁶²

In the implementation of EU values and objectives, different policies may pursue different objectives that can be in conflict among them. The European Treaties do not necessarily provide an answer to these conflicts as they are, what the constitutional scholars call “incomplete contracts.”

The potential for legal conflict in such context is high. The literature classifies legal conflicts that may occur in a multilevel context as vertical, horizontal or diagonal conflicts.

Vertical conflicts are conflicts between legal regimes at different territorial levels; they occur both between national law and EU legislation [...]. In horizontal conflicts, the injunctions of different national laws to a given case diverge. Horizontal legal conflicts occur typically in the context of transactions involving the movement of persons, goods, or finances across national borders. Diagonal legal conflicts finally

⁶¹ First the “Union’s aim is to promote peace, its values and the well-being of its peoples.” (Article 3(1) TEU) Secondly, it mentions that the EU is an “area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external borders control, asylum, immigration and the prevention and combating of crime.”(Article 3(2) TEU) Thirdly, the establishment of an internal market is described as “the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the environment.” (Article 3(2) TEU) Article 3 TEU also makes reference to promotion of scientific and technological advance, to combating social exclusion and discrimination, to promotion of social justice and protecting equality between women and men, solidarity between generations and protection of the rights to the child, to promotion of economic, social and territorial cohesion, and solidarity among Member States, to respect for the EU’s rich cultural and linguistic diversity and to the safeguarding and enhancement of Europe’s cultural heritage. (Article 3(3) TEU) Lastly, Article 3(4) TEU refers to the establishment of an economic and monetary union, the currency of which is the Euro.

⁶² These horizontal objectives comprise, inter alia, “to eliminate inequalities and to promote equality between men and women;” (Article 8 TFEU) “to promote a high level of employment”, “adequate social protection”, “the fight against social exclusion and a high level of education”, “training and protection of human health,” (Article 9 TFEU) “environmental protection,” “sustainable development” (Art. 11 TFEU) and “consumer protection,” (Art. 12 TFEU) “ensuring the provision and good functioning of services of general economic interest,” (Art. 14 TFEU) the “promotion of good governance” and “ensuring the participation of civil society.” (Art. 15 TFEU).

*occur if regimes at two different levels that apply to different aspects of a given case make contradictory demands.*⁶³

2. The conflictual dynamics of EU competition law

EU competition law mirrors the conflictual dynamics of EU law. Townley identified five regulatory challenges that potentiate conflicts in EU competition law: “competition v. co-ordination” (Issue 1); “public policy importance” (Issue 2); “appropriate mechanisms” (Issue 3), “multi-level distribution” (Issue 4), and “uncertainty” (Issue 5). These regulatory challenges may be at the origin of legal (vertical, horizontal and diagonal) conflicts.

Issue 1 is connected with what Thatcher refers to as the different “varieties of capitalism.” Thatcher pointed out that the way states perceive market power varies. For example, while the “UK has a liberal economy; Germany encourages a more inter-firm cooperation; France lies somewhere in between.”⁶⁴ The Portuguese Constitution, for example, expressly grants protection to cooperative forms of ownership in parallel with private ownership of the means of production. Though there are factors that create pressures for institutional reforms and convergence, divergent views remain across the nations regarding, for example, the role of the State, and the power of firms and organized labour.⁶⁵ Different types of capitalism have an impact on how States perceive market power, regulation in general and organising principles such as competition law, in particular.⁶⁶ Different approaches to market power

⁶³ Renate Mayntz, 'The architecture of Multi-level Governance of Economic Sectors ' (2007) Discussion Paper 07-13 Cologne: Max Planck-Institute für Gesellschaftsforschung , 23-4. See also Christian Joerges, 'The idea of a Three-dimensional Conflicts law as constitutional form' RECON Online Working Paper 2010/05 ; Giorgio Monti, 'Article 81 EC and Public Policy' (2002) 39 Common Market Law Review ; Christoph U. Schmid, 'Diagonal Competence Conflicts between European Competition Law and National Regulation – A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing' (2000) 1 European Review of Private Law ; Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)'.

⁶⁴ Mark Thatcher, 'Varieties of Capitalism in an Internationalized World' (2004) 37 Comparative Political Studies 753.

⁶⁵ Ibid.

⁶⁶ Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)'.

potentiate e.g. horizontal and vertical conflicts. The Member States and the EU may wish to have different standards under competition laws to address these issues, for example consumer welfare or the protection of the competitive process (vertical conflicts). Even within the consumer welfare standard there may be disagreements on whether to focus on long term, or short term gains.⁶⁷ Depending on the standard used the findings of an infringement to EU competition law may differ. For example, in a case of predatory prices, if the emphasis is placed on consumer welfare, such as in the EU cases and in the UK, proof of the possibility of recouping of losses is necessary. If there is no possibility of recoupment, “consumers and their interests should in principle not be harmed.”⁶⁸ However, if the focus is placed on the harm of the competitive process, such as in Germany,⁶⁹ the possibility of recouping losses need not be demonstrated in order for an infringement to be found.⁷⁰ A further example of vertical and horizontal conflicts is the different standards in case of “economic dependence” while in EU law and, for example in the UK, only article 102 TFEU would be applicable, in some Member States, e.g. France, Germany and Portugal, there are particular provisions that protect enterprises that are economic dependent (e.g. distributors) on another undertaking even though the latter undertaking may not be dominant under article 102 TFEU.

Issue 2 relates to the importance of public policy. The plurality of the Treaty’s objectives identified previously,⁷¹ also has an impact on the probability of conflicts occurring in EU competition law. Conflicts occur where conflicting goals of the Treaty collide among

⁶⁷ Christopher Townley, 'Inter-Generational Impacts in Competition Analysis: remembering those not yet born' (2011) 32 European Competition Law Review .

⁶⁸ See Opinion of Advocate General Mazák of 25 September 2008, *France Télécom v Commission*, C-202/07 P, EU:C:2008:520, paragraph 74.

⁶⁹ See Written Statement of the German Bundeskartellamt and the German Ministry of Economics and Technology on the DG Competition Discussion paper on the Application of Articles 82 of the Treaty to exclusionary abuses, Bonn 2006, p. 2.

⁷⁰ Judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraph 105.

⁷¹ See Section 2 above.

themselves or where they collide with those of the Member States. Defenders of the market orientation followed by the Treaty of Rome identified the tension between the non-market elements and the market elements of the Treaty and the possibility of conflict.⁷² This potentiates conflicts between policies pursuing non-economic goals with policies securing an undistorted competition in the internal market. Streit and Mussler argued that the inclusion of non-market elements such as “economic and social cohesion” in the Treaties offers a “considerable number of opportunities for the EU authorities to apply discretionary policies incompatible with the principle of undistorted competition.”⁷³ The Treaty of Lisbon has exacerbated the possibility of conflict between goals with the establishment of a set of enlarged principles and values of the EU, without providing a hierarchy among them and requiring the EU to “tak[e] all of its objectives into account”⁷⁴ in its policies and activities. This is of particular relevance in the context of competition law as, since its inception in the Treaty of Rome, it has been associated with the construction of the internal market.⁷⁵ As argued by Townley, the potential conflicts between the Treaty’s aims and values or between the Treaty’s aims and values and those of the Member States affect the implementing provisions such as Article 101 TFEU.⁷⁶ Different Member States and the Commission may value public policy differently. They may also value goals differently and as competition rules “have large footprints, they may affect many Member States’ public policy goals.”⁷⁷ Ezrachi speaks about the “porous and absorbent characteristics”⁷⁸ of EU competition law which make it permeable to the core values and priorities of the jurisdiction where it is being

⁷² Streit and Mussler, 'European economic and social constitutionalism after the Treaty of Lisbon'.

⁷³ Ibid.

⁷⁴ Art. 7 TFEU.

⁷⁵ David J. Gerber, 'The Transformation of European Community Competition Law?' (1994) 35 Harvard International Law Journal ; Pierre Pescatore, 'Public and Private aspects of European Community Competition Law' (1987) 10 Fordham International Law Journal .

⁷⁶ Christopher Townley, *Article 81 EC and Public Policy* (Bloomsbury Publishing 2009), 50.

⁷⁷ Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)'.

⁷⁸ Ariel Ezrachi, 'Sponge' (2016) Journal of Antitrust Enforcement , 3.

implemented. For very different legitimate reasons connected to their national context, Member States may value policy goals differently. The factual background of *Wouters* case shows how different Member States might value public policy issues and its impact in terms of enforcement of Article 101 TFEU. Netherlands Bar Association had adopted a regulation prohibiting lawyers practicing in the Netherlands from entering into multi-disciplinary partnerships with accountants. There is a public interest with the Netherlands Bar Association thought to protect: the respect for the professional rules of the bar and that lawyers remain independent and respect legal secrecy.⁷⁹ According to the Netherlands Bar Association, given the system of regulation in the Netherlands, the multidisciplinary practices of lawyers and accountants would hamper the proper practice of legal profession.⁸⁰ This rule is restrictive of competition as it prevents the creation of a business which would be in favour of many consumers.⁸¹ On the contrary, in the UK such type of multidisciplinary practices are accepted. This is an example of a horizontal conflict between Member States balancing competition law against other public interest, such as the public value of the integrity of the justice system, leading to different answers.

Issue 3 relates to the mechanisms to pursue policy goals. Even where Member States achieve an agreement as to the value of public policy Issue 2, the way Member States wish to address the issue may differ. Some might wish to leave it to the market to deal with, favouring self-regulation, in which case competition law would be relevant. Others may prefer to regulate by statute, taking the issue outside competition law. The classical example was the issue of resale price maintenance (RPM) of printed books. In the UK that was self-regulated by an agreement between the members of PA (Publishers Associations)⁸² that was approved by

⁷⁹ Monti, 'Article 81 EC and Public Policy'.

⁸⁰ Judgment of 19 February 2002, *Wouters e o.*, C-309/99, EU:C:2002:98, paragraphs 98 to 108.

⁸¹ Judgment of 19 February 2002, *Wouters e o.*, C-309/99, EU:C:2002:98, paragraphs 87 to 90 and Monti, 'Article 81 EC and Public Policy', 1086.

⁸² R.J.L. Kingsford, *The Publishers Association 1896-1946* (Cambridge University Press 1970).

the Restrictive Practices Court.⁸³ This agreement lasted from the 1950's to the 1990's. Since then, there has been no price regulation in the sale of books. In France, by contrast, under the *Loi Lang* the fixing of French language printed book prices became obligatory by statute, which had the effect of disapplying competition law to this area.⁸⁴

Issue 4 concerns multi-level power distribution. As previously seen, due to partial integration, the responses to functionally interdependent problem constellations may require a plurality of legal sources located at different levels, which potentiates conflicts. For example, Monti explores the “problem with culture” and EU competition law.⁸⁵ Building on Schmid's work on diagonal conflicts,⁸⁶ Monti submits that, due to a lack of competence of the EU in cultural matters, it may be difficult to take cultural aspects into consideration when enforcing Article 101 TFEU, and that cultural aspects should be left for national competition laws to deal with.⁸⁷ As also argued by Schmid,⁸⁸ the EU lacks true legislative competence in the field of culture. This is because the Treaty's provision on national culture, Article 167 TFEU,⁸⁹ gives very limited competence to the EU in the field of culture, and under Article 167 (5) TFEU, any harmonization is definitely excluded. This “competence clause” under Article 167 TFEU has been called by de Witte a “negative competence clause,”⁹⁰ the purpose of which is to pre-empt any further expansion of the EU's involvement in the field of culture.⁹¹ Therefore, the conflict between national laws on culture and EU competition law becomes a diagonal conflict instead of a hierarchical one, as both legal orders have competence to

⁸³ Barry J. Rodger and Angus MacCulloch, *Competition Law and Policy in the EC and UK* (Canvendish Publishing 2001), 158-59.

⁸⁴ Loi n° 81-766 du 10 août 1981 relative au prix du livre, Journal officiel de la République française, 11 août 1981 p. 2198.

⁸⁵ Monti, 'Article 81 EC and Public Policy', 1083.

⁸⁶ Schmid, 'Diagonal Competence Conflicts between European Competition Law and National Regulation – A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing'.

⁸⁷ Monti, 'Article 81 EC and Public Policy'

⁸⁸ Schmid, 'Diagonal Competence Conflicts between European Competition Law and National Regulation – A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing'.

⁸⁹ Former Article 151 EC Treaty.

⁹⁰ Bruno de Witte, 'The cultural dimension of Community law', *Collected Courses of the Academy of European Law* (Kluwer Law International 1993).

⁹¹ Ibid.

regulate different policy considerations. Therefore, according to Monti, to take cultural considerations into account under Article 101 TFEU might lack a “sound legal basis.”⁹²

Finally, Issue 5 addresses the problem of “uncertainty” which arises from opening up markets for globalisation. Townley argues that it brings fundamental transformations in models of business organisation. This may demand more complex analysis in terms of, for example, competition law assessment of the arrangements’ positive dynamic effects, e.g. joint-ventures, digital economy and disruptive innovation. For example, a joint-venture restricting competition in the EU may be justified on the basis of the need to compete at a global levels. Or to give another example, the promotion of FinTech, may undermine traditional banking models in a fundamental way. These transformational developments give raise to the possibility of conflicting solutions in the enforcement of competition law. . This may mean conflicting decisions.⁹³

Some believe however, that the opportunities for conflicts in EU competition law would be residual.⁹⁴ This is because competition law is founded on economic choices, not political choices. I do not agree and, as I show next, EU competition law mirrors the conflictual dynamics of EU law. I do not agree since most economic choices also involve political value judgements.

It has been claimed however that the founders of the Treaty of Rome, inspired by ordo-liberal theories, believed that it was “possible to reduce to a minimum the economic implications of the coexistence of sovereign states with their legal orders and systems of

⁹² Monti, 'Article 81 EC and Public Policy', 1084.

⁹³ Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)'

⁹⁴ E.g. Mario Motta, *Competition policy : Theory and practice* (Cambridge University Press 2004).

administration, their frontiers, and separate citizenship.”⁹⁵ The ordo-liberal European polity was described by Joerges and Redol as consisting of a *“two-fold structure: at supranational level, it is committed to economic rationality and a system of undistorted competition, while, at the national level, re-distributive (social) policies may be pursued and developed further [...] social policy at European level could at best be said to have been handled through intergovernmental bargaining process.”*⁹⁶ According to Gerber the ordo-liberal model was given concrete expression in the Treaty of Rome’s norms on competition and freedom of movement.⁹⁷ The ordo-liberal conception of *Ordnungspolitik*, required that individual governmental decisions should flow from the principles embodied in the economic constitution and be constrained by those same principles. Where the economic constitution calls for a transaction economy, the *Ordnungspolitik* requires that conditions of complete competition be promoted by the legal system. This would allow the economic system to function effectively, independently of political choices.⁹⁸ In such a context, where economics is decoupled from politics, conflicts would be residual if not inexistent. However, this assumption that economics can be decoupled from politics is difficult to sustain, and this is particularly true in a multilevel context, such as the EU.

Economics and politics cannot be decoupled

Economic and politics cannot be decoupled. First, we learn from political and economic sociology that market institutions are imbedded on their own political, social and ideological

⁹⁵ Giandomenico Majone, *Rethinking the union of Europe post-crisis : has integration gone too far?* (Cambridge University Press 2014), 149.

⁹⁶ Christian Joerges and Florian Rödl, 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgement of the ECJ in *Viking* and *Laval*' (2009) 15 *European Law Journal* , 4.

⁹⁷ On the influence of ordoliberalism on the European integration see David J. Gerber, *Law and competition in twentieth century Europe protecting Prometheus* (Oxford University Press 2001), 261.

⁹⁸ This justifies the presence in the Treaty of Rome, not only of the rules of free movement, but also of the competition rules directed not only to undertakings (Articles 101 – 102 TFEU) but also to the Member States (Articles 106 – 109 TFEU). Pescatore speaks about private and public aspects of the EU competition law, private when it comes to rules directed to the activity of undertakings, and public as to competition rules directed to State’s activities. Pescatore, 'Public and Private aspects of European Community Competition Law'.

contexts. Second, we learn from economics that economic decisions are rarely distributionally neutral. These aspects make it difficult for decisions on markets to be politically, socially or even ideologically neutral, as now seen.

The social embeddedness of market institutions

Laws are not neutral, “they are imbedded in the values and interests of a society and serve the interests of some at the expenses of others.”⁹⁹ Competition law is not immune to these dynamics.¹⁰⁰ On the contrary, it has a direct impact on the regulatory activity of States, potentiating conflicts. Different levels of economic development, government and enforcement structure, and market realities can all have an impact on competition rules and policy.¹⁰¹ In his work *The Great Transformation: The political and Economics of Our Time*, Mark Polanyi, observed that the market relies on three operational institutions: property, labour and money.¹⁰² These institutions are treated as commodities by the market. However, they have their own independent, political, idealistic and social qualities, independent from market processes. Against the idea of the “invisible hand” of Adam Smith, Polanyi argued that the XIX century market economy did not come into being on its own account. It was a product of planned realisation of the functional institutions upon which it relied in order to operate.¹⁰³ Accordingly, it cannot be assumed that it is possible to create EU internal market with its freedoms and competition policy by decoupling the market’s institutions from their social, political and ideological dimensions.¹⁰⁴ For example, the enforcement of the freedom

⁹⁹ Alec Stone Sweet, *Governing with judges constitutional politics in Europe* (Oxford University Press 2000), 7.

¹⁰⁰ Ezrachi, 'Sponge'.

¹⁰¹ William E. Kovacic, 'Institutional foundations for economic legal reform in transition economies: the case of competition policy and antitrust enforcement' (2001) 77 Chicago-Kent Law Review , 314.

¹⁰² Karl Polanyi, *The Great Transformation: The political and Economics of Our Time* (2nd edn, Beacon 2007).

¹⁰³ Ibid.

¹⁰⁴ For an analysis of Polanyi’s theory in the European context see Christian Joerges and Josef Falke, 'The Social Embeddedness of Transnational Markets: Introducing and Structuring the Project' in Christian Joerges and Josef Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart 2011); Michelle Everson and Christian Joerges, 'Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts-law Constitutionalism' (2012) 18 European Law Journal , 645.

to provide services may not be only about abolishing barriers to trade, but abolishing barriers to the provision of services. Take the example of the medical termination of pregnancy services. The decision on the compatibility of a prohibition of the distribution of information on how to lawfully use these services in another Member State, though it concerns the freedom to provide services,¹⁰⁵ is not without social and ideological consequences. Moreover, the decision on the compatibility with the EU competition law of a merger that can lead to the closure of a production's unit that employs great part of the workforce of the local community is not a decision without social and political consequences.

Economic decisions rarely are distributional neutral

Only where wealth effects can be ignored is it possible to separate economics from politics.¹⁰⁶ Economics shows that choices concerning markets are rarely distributional neutral. As argued by Majone, "economics tells us that economic decisions are much simpler when efficiency considerations – the size of the pie – can be separated from distributive considerations – how the pie gets divided; in other words, when the issue of how value is created is separable from that of the distribution of value."¹⁰⁷

Coase argues that only in the "world of zero transaction costs (...) the allocation of resources would be independent of the legal position."¹⁰⁸ For that to happen three conditions must be met. First, given any two alternative decisions there is a definite amount of resources to compensate the decision maker to switch from one alternative to another. Second, the amount needed to compensate the switch would not be affected if the decision maker were first given an additional amount of wealth. Third, the decision maker should have the capacity to compensate any wealth reduction necessary to pay for the switch from the less

¹⁰⁵ See Judgment of 4 October 1991, *Society for the Protection of Unborn Children Ireland/Grogan e o.*, C-159/90, EU:C:1991:249.

¹⁰⁶ Ronald Harry Coase, *The firm, the market, and the law* (University of Chicago Press 1988).

¹⁰⁷ Majone, *Rethinking the union of Europe post-crisis : has integration gone too far?*.

¹⁰⁸ Coase, *The firm, the market, and the law*.

to the more preferred option.¹⁰⁹ It is hard to find situations where at least one of these conditions would be met. Resources are not unlimited and some countries have more resources than others. Therefore, for example if Member State A could have enough resources to compensate the loss of jobs from a merger that led to the closure of the production unit that employed a great part of the work force of a community, another Member State probably could not. Moreover, even if resources were unlimited, there may be situations where no amount is enough to compensate for the loss of life, health, heavy reduction of environmental conditions, etc.

Concerning competition law specifically, some academics, such as Motta, argue that if the total surplus is adopted as a competition law goal, then it is possible to have competition law decisions where no welfare considerations are necessary.¹¹⁰ Three welfare standards can be identified: consumer surplus, producer surplus and total surplus.¹¹¹ Consumer surplus is the aggregate measure of the surplus of all relevant consumers. The surplus of a specific consumer is given by the difference between the consumer's valuation for the good considered and the price that the consumer effectively paid for it. Producer surplus is the aggregate measure of the surplus made by all relevant producers. The individual producer surplus is the surplus that is made from selling the relevant goods. The total surplus is the sum of the consumer and the producer surplus.¹¹² Under the total surplus standard the society as a whole will be better off. If the society does not like how the surplus is distributed it will always be possible to redistribute it later by other means.

This reasoning however is not flawless. As to the first premise – 'the society as a whole will be better off' – competition has many direct and indirect benefits and can affect other policy

¹⁰⁹ Paul Milgrom and John Roberts, *Economics, Organization and Management* (Prentice-Hall 1992), 35-38.

¹¹⁰ Motta, *Competition policy : Theory and practice*.

¹¹¹ Ibid Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (2nd edn, Sweet & Maxwell 2010).

¹¹² Motta, *Competition policy : Theory and practice*.

goals positively and negatively.¹¹³ This is relevant because it shows that “the claim that society as a whole it is better off is itself value-laden.”¹¹⁴ When measuring the ‘better-off’ one can focus on the increase of the surplus, or include some measurement of the environmental and cultural impact of the measure. Townley provides the following example to illustrate the “value-laden” bias of the “better-off” claim. “[W]ould one encourage an agreement between manufacturers that would increase the total surplus by € 1 million if this were to immediately lead to the irreparable poisoning of all drinking water?”¹¹⁵ He concludes by arguing that “if the total welfare standard does not make all society better off, then this would significantly weaken the claim that competition law should pursue a unitary welfare goal.”¹¹⁶

As to the second premise – “redistribution is possible by other means” – this may not be necessarily true. For example, neo-classical economists assume that even if the distribution created by the total surplus is considered unfair, a redistribution of the surplus can be done later by other means. However, they also consider that due to the dynamic nature of business practice the later distribution is risky and therefore they consider that it should be limited to a minimum.¹¹⁷ This undermines the reliance on the argument of possible redistribution by other means as a justification in the first place.

Furthermore, redistribution may not be possible or is not always convenient as it does not provide the best solution at that time. For example, a delay on redistributing the surplus may make distribution more expensive, or even impossible to remedy the inequality later in a way that makes everyone better off.¹¹⁸ This means that also when it comes to competition law and policy, it is not possible to separate economics from politics and conflicts on the

¹¹³ Townley, *Article 81 EC and Public Policy*.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

redistributional aspects of the decisions will be possible. In such a context, conflicts between different levels of government in EU competition law are inevitable and will be perceived in the several regulatory challenges which impact decision makers in EU competition law.

3. The relevance of conflicts: the EU Treaties are incomplete contracts

Given the eventuality of conflicts the constitutional issue is whether each conflict must be solved with a uniform solution across the EU or whether different solutions may be possible at national level or, at certain extent, via EU law e.g. different interpretation of EU law being possible. However, in the EU context, the answers to conflicts are incomplete as the Treaties do not lay down definite rules, and depending on the provisions in question competences are allocated differently in the EU and the Member States.

Constitutional bargain theory argues that parties contract with each other to achieve a joint purpose.¹¹⁹ However, even if united under a broad common goal, such as, for example, the reaffirmation of democratic values, peace maintenance, and economic growth, each party or group of parties that participate in the process bring to the bargaining table their own constitutional preferences, and their own ideas on how the polity is to be constructed. Each party or group of parties will fight to enshrine their ideas into constitutional provisions.¹²⁰

Due to the difficulties associated with negotiating rules for all possible contingencies, and the need to secure the adaptability of the contract to the change of conditions and evolution of parties' interests as time passes,¹²¹ constitutional agreements are achieved by what organisational economists call 'relational contracting'.¹²² The parties to an agreement seek to 'frame' broadly their relationship, by agreeing on a set of basic 'goals and objectives',

¹¹⁹ Sweet, *Governing with judges constitutional politics in Europe*.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Avinash K. Dixit, *The making of economic policy : a transaction-cost politics perspective* (MIT Press 1999).

fixing outer limits on acceptable behaviour, and establishing procedures for completing the contract over time.¹²³ “Generalities and vagueness facilitate agreements at the *ex ante* constitutional moment.”¹²⁴ The Treaty of Lisbon has the characteristics of an incomplete contract. As previously mentioned, it establishes a set of values and objectives EU policies must pursue, but it does not specify precisely what is to be done in every possible circumstance. As pointed out by Majone, as an incomplete contract, the Treaty recognises that it may not have provided the EU with all the necessary competences to pursue these goals. In order to remedy this, the Treaty grants a complementary competence to the EU, under Article 352 TFEU if an action is proved to be necessary to attain one of the objectives.¹²⁵

Furthermore, the Treaty establishes a rule on how it expects these objectives to be implemented. It specifies that these objectives are to be treated on an equal footing with the objectives set for the EU in other specific provisions of the Treaties, and the EU has to ensure consistency between its different policies and activities “taking all of its objectives into account.”¹²⁶ As the Treaty does not establish a hierarchy of goals, this causes conflict in that different Member States may value the objectives differently and may have different ways to pursue them.¹²⁷

The key issues in the competition law sphere is whether the competence is in fact exclusive to the EU, which the key to answer the central research question of this thesis: is diversity possible in EU competition law?

¹²³ Milgrom and Roberts, *Economics, Organization and Management* Giandomenico Majone, 'Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions' (1996) European University Institute, Working Paper RSC No 96/57

¹²⁴ Sweet, *Governing with judges constitutional politics in Europe*.

¹²⁵ Majone, *Rethinking the union of Europe post-crisis : has integration gone too far?*

¹²⁶ Art. 7 TFEU.

¹²⁷ This is discussed in section 2 below.

4. The value of diversity

This thesis is not concerned in reaching any conclusion or even discussion in detail the value of diversity on EU competition law, i.e. diversity as a policy choice. However, as background the following short reflection on this issue might help to clarify the background to the debate.

There is an overwhelming majority position for a uniform application of EU competition law. Defenders of uniformity generally present the following three main arguments in favour of harmonization. First, some claim that uniform law reduces business costs. Kozyra argued that international trade is affected by the prospect of divergent decisions. These can happen in the case of non-uniform competition law. Where certain conduct is legal in one territory but prohibited in another, even if trade between those territories is possible, it becomes more expensive. Firms need to understand, for example, where the law stands. Uniformity reduces these costs as it allows for the development of a detailed body of case law, reducing uncertainty as to what the laws are, and of trying to adjust business models to different types of laws. It also eliminates litigation costs related to forum shopping.¹²⁸

Secondly, Visser argues that uniformity is part of the right to equality, i.e. to have the same situation receiving the same treatment throughout the EU.¹²⁹ Advocate General Kokott argues that uniformity in EU competition law ensures “[n]ot only the fundamental objectives of equal conditions of competition for undertakings on the single market but also the concern for uniform protection of consumer interest in the entire Community.”¹³⁰ Finally, there is also the classic argument that harmonization fosters integration. As argued by

¹²⁸ Ribstein and Kobayashi, 'An Economic Analysis of Uniform State Law'.

¹²⁹ Maartje De Visser, *Network-Based Governance in EC Law* (Hart 2009), 153-154.

¹³⁰ Opinion of Advocate General Kokott of 19 February 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:110.

Dagtolou, EU law “is important as a unifying factor.”¹³¹ Conversely, diversity could lead to disintegration.

However, it is difficult to argue that any of these reasons in favour of uniformity are irrefutable. As to the transaction costs, a uniform competition law does not necessarily avoid much by way of transaction costs, as different laws in other fields remain. We have seen that integration is partial. Not so rarely, more than one set of laws will be applicable to the same facts, originating at both Member State and EU level. Also, Treaties exclude the harmonization of certain areas.¹³² Even if competition law is fully harmonized, laws on culture, environment, social protection, healthcare, and the administration of justice at Member State level may differ. Transaction costs remain. Therefore, even in the presence of the same competition law, businesses face different laws in other fields. Furthermore, “increased transaction costs may be *tolerated* if the benefits derived from diversity are sufficiently important, or at least if the cost of uniformity is more than the benefits of preventing diversity.”¹³³ We have seen that Member States may value public policy differently. This may have an impact in the application of competition law. If however, uniformity of enforcement of EU competition law is imposed upon Member States, this may give them an incentive to cheat, for example, by narrowing the definition of appreciable effect on trade between Member States. As pointed out by Walker, this contributes to legal uncertainty.¹³⁴ Legal uncertainty also increases transaction costs as it makes it more difficult for business to anticipate where the law stands.

¹³¹ Dagtolou, 'The Legal Nature of the European Community'.

¹³² Judgment of 5 October 2000, *Germany v Parliament and Council*, C-376/98, EU:C:2000:544.

¹³³ Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)'.

¹³⁴ Niel Walker, 'Flexibility within a Metaconstitutional Frame: Reflections on the future of legal authority in Europe' in Gráinne de Búrca and Joanne Scott (eds), *Constitutional Change in the EU from Uniformity to Flexibility?* (Hart 2000), 28.

Regarding Visser's and AG Kokkot's claims, the principle of equality cannot go as far as to encompass the right to have a uniform law which covers the whole of the EU. Treaties allow Member States to create different conditions of competition at home,¹³⁵ and in respect of consumer protection the harmonisation at EU level is only minimal, not precluding divergence in national legislation.¹³⁶

Finally, regarding the argument that, unlike uniformity, diversity leads to disintegration, this is a chimera. Ignoring regulatory preferences of the Member States, by imposing a uniform solution of EU law, particularly in areas under their competence, creates a democratic deficit.¹³⁷ This can lead to disillusion with the EU project and disintegration, as the people of Europe do not feel represented in EU regulatory choices.¹³⁸ Recent sovereign debt crises showed that is difficult to avoid questions on democratic legitimacy of the decisions. The degree of social mobilisation against the mechanisms agreed by the Member States and the relevant institutions of the EU to face the sovereign debt crises was notorious. This is well

¹³⁵ Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)'.

¹³⁶ Judgment of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid*, C-484/08, EU:C:2010:309, paragraphs 24-44.

¹³⁷ Christian Joerges, 'The Law's Problems with the Governance of the European Market' in Christian Joerges and Renaud Dehousse (eds), *Good governance in Europe's integrated market* (Oxford University Press 2002); Koen Lenaerts and Amaryllis Verhoeven, 'Institutional Balance as a Guarantee for Democracy in EU Governance' in Christian Joerges and Renaud Dehousse (eds), *Good governance in Europe's integrated market* (Oxford University Press 2002).

¹³⁸ For a general discussion see Weiler, '60 Years since the First European Community—Reflections on Political Messianism'; J.H.H. Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay' (2011) 9 *International Journal of Constitutional Law*.

illustrated by the *Pringle*¹³⁹ and *Gauweiler*¹⁴⁰ cases, against the European Stability Mechanism (ESM),¹⁴¹ and the Outright Monetary Transactions (OMT)¹⁴² respectively.¹⁴³ This

¹³⁹ Judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, Mr Pringle, a member of the Irish Parliament, believed that “Ireland [would] not benefit from the EU bailout, and even less so from the ESM. He argued that “the terms of the ESM [were not] in the interests of Ireland [and that the] ESM is designed in a way that will divide the EU and result in its destruction.” Thomas Pringle, 'Independent T.D. Donegal ' 2016) <<http://www.thomaspringle.ie/deutsche-welle-german-article-irish-mp-the-esm-is-destroying-the-eu/>> accessed 20 July 2017. He claimed before the Irish courts that Member States lacked the competence to adopt the ESM Treaty as the ESM was a mechanism created to ensure price stability and to save the Euro and that was within the scope of monetary policy which is, under Article 3(1)(c) TFEU, an exclusive competence of the EU. Furthermore, Mr. Pringle also argued that even if the ESM would be considered within the competence of the Member States, the exercise of that competence would have been pre-empted as the EU has occupied the area.

¹⁴⁰ Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400. Mr. Gauweiler, and several groups of individuals, including a group supported by more than 11,000 signatories brought several constitutional actions before the German Federal Constitutional Court, concerning the OMT decision on the grounds of lack of competence of the ECB inasmuch as it was not covered by the ECB mandate, infringing Article 123 TFEU and the principle of democracy enshrined in the German Basic Law, thereby impairing German constitutional identity. As argued by Schiek, the Federal Constitutional Court was used not only as a forum to discuss substantively the adequacy of actions of the government and the Parliament, but also as a space to demonstrate wide support for the claimants’ arguments in the population. Dagmar Schiek, 'The German Federal Constitutional Court’s Ruling on Outright Monetary Transactions (OMT) – Another Step towards National Closure? ' (2014) 15 German Law Journal , 331-37.

¹⁴¹ In March 2011 the Member States amended Article 136 TFEU by the simplified revision procedure, introducing the possibility to “Member States whose currency is the Euro, to establish a stability mechanism to be activated if indispensable to save the stability of the euro area as a whole.” Council Decision 2011/199 of March 25, 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, [2011] OJ L 91/1. The European Stability Mechanism entered into force, in October 2012, as an intergovernmental organisation on the basis of an international treaty between the Eurozone Members. Under Article 3 of the ESM “The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financial problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreement or arrangements with ESM Members, financial institutions or other third parties.”

¹⁴² In September 2012 the European Central Bank created the Outright Monetary Transactions, a mechanism which conferred to it the power to purchase government bonds in secondary markets. European Central Bank ECB Monthly Bulletin <<https://www.ecb.europa.eu/pub/pdf/mobu/mb201209en.pdf>> European Central Bank, 'Technical features of Outright Monetary Transaction' ECB Press Release <http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 6 September.

¹⁴³ Eventually, in both the *Pringle* and *Gauweiler* cases the CJEU upheld the challenged measures, as was expected by national governments and European institutions. These rulings are not exempted of critiques to its legal reasoning. Van Malle Ghem claims that they represent a “shift from crisis prevention to crisis management.” Joerges accused the CJEU of following a “strictly doctrinal approach and formalistic reasoning.” Craig criticises the reasoning of the CJEU in the cases as a “fusion of different methods of interpretation required by the limits of what could be achieved by textual interpretation to achieve what was a desirable conclusion” by others. Pieter-Augustijn Van Malleghem, 'Pringle: A Paradigm Shift in the European Union's Monetary Constitution' (2013) 14 German Law Journal ; Christian Joerges, 'Pereat iustitia, Fiat Mundus: What is Left of the European

debate on diversity in EU law has never been as important as now, the aftermath of the Brexit vote. As Grimm put it, the peoples of Europe know that “whereas Grexit would be a judgment on Greece, Brexit was a judgment on the EU.”¹⁴⁴ Many European voices have since then raised to call for more respect to national or regional differences and underline the risk of EU leaders taking steps towards further centralisation and, as expressed by Helmut Kohl, “mistaking a unified Europe with a standardised Europe.”¹⁴⁵

EU competition law cuts across many policy domains,¹⁴⁶ some of which may still be under the responsibility of the Member States (e.g. culture v. competition). Imposing a uniform solution of EU competition law, lacks democratic legitimacy. This is not the best way to protect integration.

Diversity - Regulatory competition

A major advantage of diversity is that, it not only increases the legitimacy of the decisions; it increases the chances of better regulation, experimentalism and innovation, which eventually will improve the quality of decisions. These are the assumptions put forward by the literature on regulatory competition as the outcomes of diversity. The concept of regulatory competition originates in the work of Tiebout¹⁴⁷ regarding regulatory competition of fiscal federalism. It claims that if left to compete, governments will adopt regulations that efficiently match the needs of their people. According to the Tiebout model, “if social tastes and preferences differ and if States are allowed to exist and take those differences into

Economic Constitution after the Litigation?’ (2016) 23 Maastricht Journal of European and Comparative Law ; Paul Craig, 'Pringle : Legal Reasoning, Text, Purpose and Teleology' (2013) 20 Maastricht Journal of European and Comparative Law, 2013 .But see Gunnar Beck, 'The Legal Reasoning of the Court of Justice and the Euro Crisis – The Flexibility of the Court's Cumulative Approach and the Pringle Case' (2013) 20 Maastricht Journal of European and Comparative Law .

¹⁴⁴ Brendan Simms, 'A new balance of power: is full political union of the eurozone the only way to stop the disintegration of Europe after Brexit?' (2016) 145 New Statesman .

¹⁴⁵ Helmut Kohl, 'Helmut Kohl calls on EU leaders to take 'one step back' after Brexit vote' *The Guardian* (16 July) <<https://www.theguardian.com/world/2016/jun/30/helmut-kohl-warns-eu-leaders-one-step-back-after-brexit-vote> >

¹⁴⁶ Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)'.

¹⁴⁷ Tiebout, 'A Pure Theory of Local Expenditures'.

account in passing laws, then the States will compete with one another to satisfy their citizens' preferences for public goods."¹⁴⁸ Governments supply legal products and institutions, and as suppliers of any other goods should be subject to market conditions. Competition pressure from other governments – regulatory competition – will force governments to produce regulations efficiently if they do not want to risk of losing their clients, i.e. citizens and or business.¹⁴⁹ Supporters of regulatory competition argue that this competition leads to match the demand for public services with the corresponding willingness of citizens to pay the taxes required to provide them. Also, Calabresi argues that decentralised governments make better decision than centralised ones as “decentralisation ensures that those responsible for choosing a given social policy are made aware of the costs of that policy.”¹⁵⁰ Regulatory competition however, can lead to a race to the bottom, where jurisdictions lower standards. In such situations there may be a claim for a centralised intervention in order to avoid undesirable outcomes. This theory is based on three necessary premises. First, that governments are free to decide on their policies. Secondly, that individuals and businesses are free to move between jurisdictions up to a certain extent. Finally, that the market is sufficiently transparent to allow them to make informed choices.¹⁵¹

Competition policy and Regulatory competition

The possibility of regulatory competition in the field of competition law is contested by Fox.¹⁵² She claims that either regulatory competition does not work in competition or, if it works, it only creates a race to the bottom, which supports a centralised solution. This is

¹⁴⁸ Calabresi, 'A government of limited and enumerated powers': in defense of United States v. Lopez (Reflections on United States v. Lopez)'.
¹⁴⁹ Frank H. Easterbrook, 'Antitrust and the economics of federalism' (1983) 26 The Journal of Law and Economics 34.

¹⁵⁰ Calabresi, 'A government of limited and enumerated powers': in defense of United States v. Lopez (Reflections on United States v. Lopez)'.
¹⁵¹ Herwing C.H. Hofman, Gerard C. Rowe and Alexander H. Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2012), 54.

¹⁵² Eleanor Fox, 'Antitrust Law on a Global Scale: Races Up, Down, and Sideways' in Daniel C. Esty and Damien Geradin (eds), *Regulatory competition and economic integration: comparative perspectives* (Oxford University Press 2001).

contested by others, such as Easterbrook, who argues that regulatory competition is possible and that States must not have restraints as regards their economic regulatory activity. Finally, there are also those who argue for a milder form of regulatory competition.¹⁵³

Eleanor Fox argues that regulatory competition does not necessarily work as regards competition policy.¹⁵⁴ She makes this claim in the context of a study about the globalisation of competition laws, but it is just as valid in the EU regional context; this is only a question of scale. Fox argues that “the concept [of regulatory competition] assumes that nations are competing against one another in the formulation or application of their laws to be more attractive to business than the neighbour’s laws.”¹⁵⁵ According to Fox, competition law does not work like this. That is because, generally, companies are subject to competition laws of the jurisdictions where their anticompetitive behaviours are felt, irrespective of where they are located. In this sense, competition law is different from, for example, corporation law, as only one law grants firms corporate character. Therefore, competition law is not a determinant element for a company to “exit” a jurisdiction to another one, as it will not allow it to avoid enforcement of the competition law of a different jurisdiction. In any case, Fox claims that there may nevertheless be some “margin for a race among nations” when it comes to competition rules. However, that race would lead to a race to the bottom, which is an argument in favour of the need for a centralised solution. She argues that a competition law based on economic efficiency only (i.e. it only prescribes conduct or transactions that lessen both rivalry and efficiency) is less costly to business than a competition law which takes public policy into consideration. When in confrontation, the former competition law would be considered the bottom and the latter would be considered the top. Given the

¹⁵³ Ibid Daniel C. Esty and Damien Geradin, 'Regulatory Co-operation' in Daniel C. Esty and Damien Geradin (eds), *Regulatory competition and economic integration: comparative perspectives* (Oxford University Press 2001); Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)'

¹⁵⁴ Fox, 'Antitrust Law on a Global Scale: Races Up, Down, and Sideways'.

¹⁵⁵ Ibid.

globalisation of markets, jurisdictions with the costlier competition law would have an incentive to change its criteria to economic efficiency only.¹⁵⁶ This means a race to the bottom; this pleads in favour of a centralised uniform solution in order to avoid such a result.

Fox's arguments against the possibility of regulatory competition in the field of competition can however be contradicted, for two major reasons. Firstly, Fox's argument that competition law does not determine the "exit" of companies from one jurisdiction to another can be proved wrong. Fox's starting point is that the motive for a company to exit a certain jurisdiction would be to escape the application of competition law. However, this assumption may be wrong. A company may not wish to escape competition law as it did not breach it but may want it to be enforced against its competitors in order to maintain a level playing field. A company may prefer to be in a jurisdiction whose competition law offers merger control and prohibits abuse of dominance and not only cartels. Furthermore, is not absolutely accurate to say that competition law would not determine exit. Cross-border enforcement of competition law is more complex than national enforcement. Political foundations and enforcement structures have an impact on the implementation of competition laws.¹⁵⁷ Therefore, a company may prefer to be located within jurisdictions that have a strong record of national and cross-border competition law enforcement.

Secondly, "exit" is only one of the criteria for regulatory competition to be possible. Others are a "plurality of jurisdictions, with freedom to select any law they desired and if all consequences of one jurisdiction's regulation are felt within that jurisdiction."¹⁵⁸ The closer one comes to fulfilling all these conditions, the more likely effective competition between jurisdictions becomes. This is particularly relevant if we take into consideration the wider context of economic regulation. Competition law exists in parallel with legislation which

¹⁵⁶ Ibid.

¹⁵⁷ Kovacic, 'Institutional foundations for economic legal reform in transition economies: the case of competition policy and antitrust enforcement'.

¹⁵⁸ Easterbrook, 'Antitrust and the economics of federalism'.

pursues different objectives. Integration in the EU is partial, so different levels of government may be competent to regulate different aspects of the same problem. The more jurisdictions there are, the easier it is for a person to find one where the law suits her needs the best. A uniform solution for EU competition law may undermine this. It should be possible to allocate competence at different jurisdictional levels as this would increase the number of jurisdictions, and therefore increase the pressure on governments to provide the set of laws people with a credible exit capability value the most. Additionally, regarding the extent to which governments can tailor their laws, the more options they have the more they can try to attract people with their laws. Therefore, the more the laws can correspond to the needs of the population, i.e. the more chances there are for a good law.

Taking this into consideration, Easterbrook argues that States should not be limited in their legislative choices. Regulatory competition should be absolute even if that means an “inverse supremacy” rule, i.e. a principle under which state and local rules prevail over the EU’s law.¹⁵⁹ Otherwise, the chances for the states to get the law that best suits their populations may be undermined. He considers that this is not a desirable result as there are reasons to believe that whenever politically powerful groups (including companies) are denied their preferred methods of regulation, the result will be worse for all groups. This is because firms that have political power will maximise the redistribution of income in their favour by holding as low as they can the allocative loss of their chosen methods. He believes that there is “at least a weak presumption that politically powerful groups will initially choose methods of redistribution that have relatively low deadweight losses. If these preferred methods are foreclosed, perhaps by federal antitrust doctrine, politically powerful groups will shift to other methods of redistribution that benefit them less but, perhaps, also leave less for the rest of us.”¹⁶⁰ The only limitation to state regulatory freedom which Easterbrook accepts is

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

the prohibition of monopoly overcharge. If the externalities of the legislation are not felt within the jurisdiction of the state, there is no incentive for exit, which reduces the chances of regulatory competition. In his words: “[U]nder such an approach States could have any rules they want, so long as he who calls the tune also pays the piper.”¹⁶¹ This extreme approach to regulatory competition seems however not to be adequate and there have been calls for a moderate version of regulatory competition, such as the possibility for “regulatory-co-operation”¹⁶² or for “coordinate diversity.”¹⁶³

Esty and Geradin present a critique to the debate on the merits of “regulatory competition” versus “harmonization.”¹⁶⁴ They argue that both race towards the bottom and regulatory competition theories, and the resulting centralisation and decentralisation strategies that they trigger, “are overstated.”¹⁶⁵ They present an alternative approach that they call “regulatory-co-operation.” Among the points they raise is the fact they believe that competition between regulators may produce inefficient outcomes and therefore, some sort of cooperation between and among jurisdictions may be required. This is because of the following four major reasons: market failure, externalities, imperfect information and lack of mobility. The benefits of regulatory competition depend on the forces generated by a functioning and competitive market for legal products. There are however reasons to believe that there are market failures, notably for lack of adequate information, that do not allow markets to operate in an efficient manner. This makes the market for legal products relatively imperfect, and therefore, competition cannot be counted on to deliver an optimal outcome. Furthermore, externalities cannot be ignored by the regulator. If regulators systematically ignore the impact their regulations have beyond their own borders, then the

¹⁶¹ Ibid.

¹⁶² Esty and Geradin, 'Regulatory Co-operation'.

¹⁶³ Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)'.

¹⁶⁴ Esty and Geradin, 'Regulatory Co-operation'.

¹⁶⁵ Ibid.

standards that they set will be systematically suboptimal. We have seen however that the benefits of regulatory competition are stronger if the costs associated with the regulatory policy are confined to the borders of the regulatory jurisdiction. Externalities can be of very different nature. For example, they can be physical, such as pollution spillover, as air or water pollution. They can also be economic, weak enforcement of competition rules in one nation may have a negative impact on the profits of a foreign-based producers whose products are thereby squeezed out of the market. Esty and Geradin argue that “to the extent that these spillover effects are not based on market-clearing effects but rather driven by strategic behaviour, suboptimal results must be anticipated.”¹⁶⁶ Another reason for a failure of regulatory competition is imperfect information. To understand whether the government is delivering an appropriate level of regulation and doing so in a cost-effective manner may not be possible or be too difficult to assess, particularly when the scope of the inquiry covers a large number of regulatory variables, e.g. environment, health, competition, tax burden, etc. Finally, there may also be an issue of lack of mobility. Regulatory competition requires that natural and legal people are free to exit a jurisdiction to another they believe to have regulation that correspond more to their needs. However, Esty and Geradin show that perfect mobility may also not reflect the reality, as, for example, in case of business “market requirements and regulatory barriers dramatically constrain mobility.”¹⁶⁷

They offer “Regulatory co-operation” as an alternative model. They argue that “the regulatory process will almost always benefit from a degree of *cooperation* among governmental actors and between governmental officials and non-governmental actors.”¹⁶⁸ This cooperation may occur in shared mechanisms for issue-spotting, joint information gathering or data exchange, divided or collaborative research and analytic work technology

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

or policy transfers and a division of labour in policy implementation and evaluation.¹⁶⁹ It may also occur between different levels of government and between non-political actors.

In the specific field of competition, Townley argues for “coordinated diversity,” which implies coordinated regulatory competition. Townley claims that there is space for diversity in EU competition law. Diversity allows to solve complex jurisdictional problems, democratic legitimacy and diverse national views on public policy. Members of the European Competition Network become public laboratories. They share outcomes, generating a reach pool of learning experiences and comparing results against the best performances. This should aid in rapidly leading to the best practice and harmonisation or at least informed divergence. Townley however points out that diversity can lead to increased costs of international trade, raise the spectrum of externalities and races to the bottom and as such it can undermine the internal market.¹⁷⁰ Therefore, he concludes, both uniformity and diversity are valuable. The answer he proposes is coordinated diversity in the field of competition. It is something between diversity and uniformity. The idea goes as follows; the EU Court lays down the law. However, the Commission and the national competition authorities can experiment in the gaps. “The aim is to encourage sufficiently commonality and expertise while simultaneously encouraging experimentation and accepting diversity in EU competition law and other areas too.”¹⁷¹

Conclusion

The considerations set out above in this chapter show that conflicts are inherent in the EU law in general, and in EU competition law in particular, for many different aspects and at many different levels. EU Treaties are incomplete contracts, determining a set of values and

¹⁶⁹ Elizabeth Freeman, 'The division of powers between the European Communities and the Member States' (1977) 30 *Current Legal Problems* quoted by Esty and Geradin, 'Regulatory Co-operation'.

¹⁷⁰ Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)'.

¹⁷¹ Ibid.

objectives of the EU policies without always specifying precisely what to do in case of conflicts between the EU and the Member States or between different Member States due to different preferences and redistributive consequences of decisions taken. The question of where competence lies to resolve these conflicts in competition law, in particular whether it is exclusive competence of the Union or a shared competence between the Union and the Member States is therefore of paramount importance. This is the central question of the next chapters.

Chapter 2 - The EU constitutional response to the allocation of multijurisdictional competence

Chapter 1 has discussed the existence of conflicts as an inherent feature of EU (competition) law, Chapter 2 highlights the importance of how competences are allocated between the Union and the Member States. Competence allocation within the EU has an impact on how conflicts are solved and thus on the degree of diversity allowed. Whether Member States can legislate and whether they can enforce EU competition law will depend on the way competence in the field of competition is allocated in the EU. Multijurisdictional competence allocation sets the jurisdictional boundaries of the Union and of the Member States. If only the Union has competence, then the door to diversity may be closed. If both the Union and Member States can act, the door to diversity is left open.

Competence allocation within the EU is constitutionally protected. Depending on the relationship with the competences of the Member States,¹⁷² the Treaty of Lisbon subdivided the Union's competences into exclusive and non-exclusive competences. Where the EU has exclusive competences Member States may act only if empowered by the Union or to implement a Union act. If a competence is non-exclusive, the competence of the Member States is not suppressed in those areas.

It has been claimed that "there are only two realistic options in the field of competition law: competence is exclusively conferred to the EU, so that a single set of rules is applicable across the EU and Member States surrender what legislative competence they have; or competence is shared, that is to say the EU legislator leaves space for national competition legislation

¹⁷² Lenaerts and others, *European Union Law*, 124.

provided that the latter does not conflict with the former.”¹⁷³ Since the Treaty of Lisbon, under Article 3(1)(b) TFEU, the EU has exclusive competence in the area of “the establishing of the competition rules necessary for the functioning of the internal market.” This provision is considered controversial by the majority of commentators.¹⁷⁴ Nevertheless, all seem to acquiesce to the fact that the Treaty of Lisbon has consecrated an exclusive competence of the EU in the area. This would be a crucial limitation of the Member States’ capacity to legislate on competition matters and to enforce EU competition law. Therefore, a careful analysis of the EU competence in the field of competition is of paramount importance.

This chapter reviews the academic literature on competence allocation in the field of EU competition law (Section 1) and sets the framework of analysis of the system of competences introduced by the Treaty of Lisbon (Section 2). This chapter also identifies what Dashwood calls “conservative elements”¹⁷⁵ that allow Member States to preserve their positions by influencing the EU legislative and executive decision making processes: the voting at the Council and the subsidiarity principle (Section 3). It finally explores the applicability of the principle of subsidiarity to the exercise of EU executive competence (Section 4).

¹⁷³ Monti, 'Legislative and Executive Competence in Competition Law', 104.

¹⁷⁴ See Dashwood, 'The relationship between Member States and the European Union/European Community'; Monti, 'Legislative and Executive Competence in Competition Law'; Serena Rossi, 'Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and Member States?'; Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)'.

¹⁷⁵ Alan Dashwood, 'States in the European Union' (1998) 23 *European Law Review* .

1. Article 3(1)(b) TFEU - EU exclusive competence in the area of “the establishing of the competition rules necessary for the functioning of the internal market”

The competence of the EU as regards competition matters is set out in Article 3(1)(b) TFEU, i.e. within the list of competences under the exclusive competence of the EU. Under this provision:

“The Union shall have exclusive competence in the following areas:

(b) the establishing of the competition rules necessary for the functioning of the internal market;”

Article 3(1)(b) TFEU has provoked some controversy in the doctrine for various and, often, opposite reasons. There are authors, such as Monti, Rossi, Schütze and Townley, who question the reference to competition under Article 3 TFEU, i.e. in the list of the exclusive competence of the EU. They see no coherence in classifying as exclusive the EU’s competence to establish competition rules necessary for the functioning of internal market. However, they all consider that the EU legislative competence in EU competition law has become exclusive under the Treaty of Lisbon. Other authors consider that Article 3(1)(b) TFEU did not change the *status quo*. Dashwood considers that Article 3(1)(b) TFEU states the obvious and that “the reference to competition policy [under Article 3(1)(b)TFEU] is technically inept.”¹⁷⁶ Finally, Liannos seems to see no problem with this provision. He states

¹⁷⁶ Dashwood, 'The relationship between Member States and the European Union/European Community'. As for the other four areas listed in Article 3(1) TFEU Dashwood commented that they are “unexceptionable,” as they represent “the generally recognized categories of a priori exclusivity, except that the custom union is mentioned separately from the common commercial policy.” This reference was made to the catalogue of exclusive competence of the Union provided for in Article 12 of the Convention Draft, but that has been retained as the catalogue of exclusive competence under Article 3 TFEU.

that Article 3(1)(b) TFEU confirms that “competition law is as before, one of the EU exclusive competences.”¹⁷⁷

I argue that the arguments put forward by the above-mentioned authors concerning the exclusive nature of the EU legislative competence in EU competition law are not fully convincing.

Starting with the arguments of those authors who question the classification of EU competence in competition matters as exclusive to the EU under Article 3(1)(b) TFEU, Monti struggles with this classification. He argues that, as confirmed by the CJEU in *AKZO*, the EU holds exclusive competences “insofar as the procedural rules to empower the Commission to apply the Treaty provision on competition are concerned.”¹⁷⁸ This is necessary to safeguard the uniform and effective application of the EU competition law by the Commission.¹⁷⁹ However, Monti finds no logic in classifying as exclusive the EU competence to enact substantive competition rules. He argues that such competence is shared “at least from an economic point of view.”¹⁸⁰ The application of national competition laws has a positive effect on the market as a whole and therefore contributes to the EU goals in respect of the functioning of the internal market. I agree with Monti on this point. The enforcement of national competition laws has an impact on the overall level of competition in Member States which will have an impact on the overall level of competition in the internal market. Monti then tries to analyse this situation from a legal point of view and asks whether the EU’s competence in the field of competition could, though exclusive, be granted back by the

¹⁷⁷ Ioannis Lianos, 'Competition law in the European Union after the Treaty of Lisbon' in Diamond Ashiagbor, Nicol Countouris and Ioanis Lianos (eds), *The European Union After the Treaty of Lisbon* (Cambridge University Press 2012).

¹⁷⁸ Monti, 'Legislative and Executive Competence in Competition Law'.

¹⁷⁹ Ibid. Monti however, mentions that the EU legislator has been sensitive to certain national considerations, such as exemplified by Article 20 of Regulation 1/2003. Under this provision the Commission has broad powers to inspect premises, However, the Commission must seek a search warrant in those Member States where such warrant is necessary before such inspection is carried out.

¹⁸⁰ Ibid.

EU to the Member States, under Article 2(2) TFEU. In such cases, Member States would exercise their competence “to the extent that the Union has ceased exercising its competence.” According to Monti, Article 3 Regulation 1/2003 would be a particular illustration of this situation in the competition field. Article 3(1) of that Regulation establishes that when Member States apply national competition law to situations which fall under Article 101 and 102 TFEU they must apply EU law as well. The first paragraph of Article 3(2) replicates what the Court held in *Walt Wilhelm*,¹⁸¹ that when applying national law Member States must not reach a result contrary to EU law. Nevertheless, Article 3(2) allows Member States to apply stricter unilateral conduct laws, granting competence back to the Member States. Article 3(3) would also grant competence back to the Member States in respect to merger control as it states that national merger control rules are not affected by Regulation 1/2003. Monti concludes however that this interpretation of Article 3 Regulation 1/2003 would go against the aim of the Treaties to clarify the EU competences.¹⁸² Support for the possibility of the EU granting exclusive competence back to the Member States is not unanimous in the literature. Some authors, such as Lenaerts and Van Nuffel, consider that the EU cannot grant exclusive competence back the Member States.¹⁸³ I agree with this position, as to allow the EU to grant exclusive powers back to the Member States would be to allow a secondary legislative act to change the structures of the competences as provided for in the Treaties. This runs against the principle of conferral. In any situation, it seems to me even less probable for it to be possible under Article 2(2) TFEU, as this provision concerns areas of shared competence only. EU competence in competition matters though is mentioned under Article 3, i.e. within the list of exclusive competence of the EU. Moreover,

¹⁸¹ Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4.

¹⁸² The objective of the definition of competences had the objective of clarifying and simplifying the division of competence between the Union and the Member States. See Declaration adopted by the European Council of December 14 and 15, 2001 at Laeken, paragraphs 3 and 4.

¹⁸³ Lenaerts and others, *European Union Law*, 125.

to try to understand the nature of the EU's competence in competition on the basis of Regulation 1/2003 can be a misleading exercise. Regulation 1/2003 is secondary legislation. As such it cannot change the nature of EU competence under primary law.

Turning now to Rossi's arguments, she questions the choice of the EU constituent legislator to classify the competence of the EU to legislate on competition law as exclusive to the EU. Rossi claims that that there is no rationale for an exclusive competence of the EU regarding competition except for State Aid rules only.¹⁸⁴ However, the same could not be said of disciplining cartels and abuse of dominance. Furthermore, she points out that the Protocol (No 27) on the Internal Market and Competition is contradictory with an exclusive competence in this area. The Protocol states that:

"Considering that the internal market set out in Article 3 of the Treaty on European Union includes a system of ensuring that competence is not distorted (...) To this end the Union shall if necessary take action under the provisions of the Treaties, including Article 352 of the Treaty on the Functioning of European Union."

Article 352 TFEU grants to the EU residual competence within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, where the Treaties have not provided the EU with the necessary powers to act. Rossi concludes, though very briefly, that the classification as an exclusive competence has however become clear after the Treaty of Lisbon. She adds that though previous jurisprudence of the Court seems to contradict the existence of an exclusive competence, the Court of Justice of the European Union (CJEU) itself seems to have changed its approach in *Akzo*, recognizing that the Regulation 1/2003 and the principles it establishes form part of the competition rules necessary for the functioning of internal market under Article 3(1)(b) TFEU.¹⁸⁵

¹⁸⁴ Serena Rossi, 'Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and Member States?'.
¹⁸⁵ Ibid.

I agree with Rossi that there is no real rationale for an exclusive competence of the EU for matters other than State Aid. This has been shown by Townley who made an exhaustive inquest on the reasons that can justify a competence being exclusive to the EU. This will be discussed below. I also agree with Rossi that Protocol (No 27) on the internal market and competition,¹⁸⁶ and previous jurisprudence of the CJEU, points to the existence of a shared competence to adopt substantive competition rules.¹⁸⁷ However, I disagree with Rossi's conclusion that it is clear that the competence in competition matters has become exclusive under the Treaties and that the CJEU has also changed its approach to the competence of the EU in conformity. I argue that *AKZO* is limited in scope and that Rossi's interpretation of this case is too broad. First, *AKZO* concerns EU competence to adopt procedural rules applicable to the Commission's proceedings under Article 101 and 102 TFEU only. No conclusions on the competence of the EU to adopt substantive competition rules or to enforce EU competition law can be drawn from *AKZO*. Secondly, the CJEU approach to EU competences under *AKZO* is fully coherent with previous jurisprudence on this matter. The CJEU has always rejected the possibility of legal privilege in the context of Commission procedures to be regulated by national procedural law, it was rather for the EU alone to regulate it.

The background of the *AKZO* case is a dispute that occurred in a search conducted by the European Commission, in February 2003, at the business premises of Akzo Nobel Chemicals Ltd and of its subsidiary Akcros Chemicals Ltd, in the United Kingdom. In the course of that search, officials from the Commission took photocopies of two e-mails exchanged between the managing director and Akzo Nobel's coordinator for competition law. This coordinator was an Advocaat of the Netherlands Bar and a member of Akzo Nobels' legal department

¹⁸⁶ The equivalent to now Article 235 TFEU (Article 308 EC Treaty) has already been use in the field of Mergers, for the adoption of the Merger Regulation.

¹⁸⁷ See Chapter 4.

employed by the company. The representatives of Akzo and Akcros regarded these documents as being exempted from seizure. In their view, they were covered by legal professional privilege. The Commission rejected that claim and considered that the documents were not covered by legal professional privilege. Akzo brought an action against this decision before the General Court, which dismissed the action.¹⁸⁸ Akzo appealed against the judgment to the CJEU. One of the grounds of appeal presented was that the findings of the General Court violated the principle of national procedural autonomy and the principle of conferred powers. The CJEU rejected these claims. It recalled that:

*“in accordance with the principle of national procedural autonomy, in the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law.”*¹⁸⁹

The Court considered this ground as unfounded as:

*“in the present case, the Court is called on to decide on the legality of a decision taken by an institution of the European Union on the basis of a regulation adopted at European Union level, which, moreover, does not refer back to national law.”*¹⁹⁰

In this regard, the Court confirmed:

*“that the rules of procedure with respect to competition law, as set out in Article 14 of Regulation No 17 and Article 20 of Regulation No 1/2003, are part of the provisions necessary for the functioning of the internal market whose adoption is part of the exclusive competence conferred on the Union by virtue of Article 3(1)(b) TFEU.”*¹⁹¹

This is so because:

“in accordance with the provisions of Article 103 TFEU, is for the European Union to lay down the regulations and directives to give effect to the principles in Article

¹⁸⁸ Judgment of 17 September 2007, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, Joined cases T-125/03 and T-253/03, EU:T:2007:287.

¹⁸⁹ Judgment of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, C-550/07 P, EU:C:2010:512, paragraph 113.

¹⁹⁰ *Ibid*, paragraph 114.

¹⁹¹ *Ibid*, paragraph 116.

101 TFEU and 102 TFEU concerning the competition rules applicable to undertakings. That power aims in particular to ensure observance of the prohibitions referred to in those Articles by the imposition of fines and periodic penalties payments and to define the Commission's role in the application of those provisions.”¹⁹²

The scope of *Akzo* is thus limited to the adoption of procedural rules under Article 103(2)(a) and (d) TFEU, to be applicable by the Commission on its proceedings to enforce Articles 101 and 102 TFEU. The Court confirms that such competence is exclusive of the EU under Article 3(1)(b) TFEU. As pointed out by Monti, this finding could be only logical, as to allow Member States to legislate in this matter would render the uniform and effective application of the EU competition law by the Commission impossible.¹⁹³

Moreover, contrary to Rossi's conclusions, *AKZO* cannot be seen as a change of the Court's approach to the EU's competence on procedural matters. It is well established case law that the Commission enforces EU competition law according to the procedural provisions enacted under Article 103 TFEU, subject to the general principles of EU law and respect for Human Rights. If those provisions had not been enacted, the Commission would enforce EU competition law according to the rules established directly in the Treaty under Article 105 TFEU.¹⁹⁴ Furthermore, a similar issue to the one in *Akzo* was brought before the Court for the first time in *AM & S v Commission*¹⁹⁵, and the Court considered that Member States had no competence to regulate the matter. In *AM&S v Commission*, the Commission had requested the applicant to produce documents in the course of its investigation to enforce EU competition law. The company raised objections to the request of the Commission as it

¹⁹² Ibid, paragraph 117.

¹⁹³ Monti, 'Legislative and Executive Competence in Competition Law', 110. Monti however, mentions that the EU legislator has been sensitive to certain national considerations, such as exemplified by Article 20 of Regulation 1/2003. Under this provision the Commission has broad powers to inspect premises. However, the Commission must seek a search warrant in those Member States where such warrant is necessary before such inspection is carried out.

¹⁹⁴ Judgment of 6 April 1962, *De Geus en Uitdenbogerd v Bosch and others*, Case 13/61, EU:C:1962:11.

¹⁹⁵ Judgment of 18 May 1982, *AM & S v Commission*, Case 155/79, EU:C:1982:157.

considered that the documents were protected by legal professional privilege. Neither Regulation 17/62, which provided for the powers of the Commission to order inspections and carry out investigations, nor any other EU law protected the confidentiality of communications between lawyer and client. The Court considered that in all Member States, written communication between lawyer and client are protected by virtue of a principle common to all those States, even if the scope and means of that protection can vary from one country to another. The Court specifically stated that:

“Community law, which derives from not only the economic but also the legal interpenetration of the Member States, must take into account the principles and concepts common to all the laws of those states concerning the observance of confidentiality, in particular, as regards certain communications between lawyers and clients. That confidentiality serves the requirements, the importance of which is recognized in all of the Member States, that any person must be able without constraint to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it.”¹⁹⁶

Despite differences of the meaning and scope of protection of legal privilege in the Member States, the CJEU recognised a common criterion among Member States. They all protect, in similar circumstances, the confidentiality of written communications between lawyer and client provided that (i) such communications are made for the purpose and in the interest of the client’s right of defence and (ii) they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.¹⁹⁷ The Court concluded then that Regulation 17/62 should be interpreted as respecting confidentiality of communications between lawyer and client subject to those two conditions.¹⁹⁸ The Court did not recognize any legislative power to the Member States on procedural matters to be applicable to the Commission’s proceedings. The reference made to the national laws was in order to identify a general principle common to the laws of the Member States, inferring the

¹⁹⁶ Judgment of 18 May 1982, *AM & S v Commission*, Case 155/79, EU:C:1982:157, paragraph 18.

¹⁹⁷ *Ibid*, paragraph 21.

¹⁹⁸ *Ibid*, paragraph 22.

existence of a general principle of the EU legal order to be respected by EU institutions.¹⁹⁹ Therefore, when it comes to the competence to establish procedural rules applicable to the Commission in its proceedings to enforce Articles 101 and 102 TFEU, particularly regarding legal professional privilege, the CJEU has always considered it as an exclusive competence of the EU. AKZO does not therefore, represent a change to the CJEU approach to EU competences after the Treaty of Lisbon.

Townley is also surprised by the classification of EU competence in competition as exclusive and goes as far as to wonder whether competition became an exclusive competence under the Treaties as the result of an error.²⁰⁰ Perhaps, he asks, “the [Treaty’s] drafters were focusing on State Aids rather than Articles 101 and 102?”²⁰¹ Townley conducts an inquest on the foundations of EU competences. Building on the work of Schütze, he analyses two reasons that had been used to justify a competence emerging as exclusive in the EU legal order. There is an ontological rationale, under which competence ought to be exclusive where legal action at the state level would be conceptually impossible. There is also a functional rationale, that requires a competence to be exclusive where necessary for the defence of the common interest of the EU.²⁰² Townley asks whether either one of those rationales could justify the EU competence in competition to be exclusive.²⁰³ He concludes they could not.

A critique of the ontological rationale is that it can lead to the following fallacy: Member States cannot harmonise each other’s laws, only EU action can. Therefore, EU action in fields that fall within the Treaty must be under the exclusive competence of the EU. Schütze argues

¹⁹⁹ EU general principles are also binding on the Member States.

²⁰⁰ Christopher Townley, 'Constitutional limits to diversity (and Co-ordinated diversity) in EU competition law', *Draft manuscript with the author* (2017), 41.

²⁰¹ Ibid.

²⁰² Robert Schütze, 'Dual Federalism Constitutionalised: The emergence of Exclusive competence in the EC legal Order' (2007) 32 *European Law Review* 3.

²⁰³ Here Townley refers to the work of Schütze that present ontological and functional rationales as the two reasons that could justify a competence to the exclusive of the EU. See *ibid*, 29.

that the CJEU “has not succumbed to the ontological fallacy,” as it treats the EU’s competence in the internal market as shared.²⁰⁴ Townley claims that the ontological rationale seems to have been rejected by the Treaty of Lisbon, as under Article 4(2)(a) TFEU competence in the internal market is again shared,²⁰⁵ even if conflicts are possible. For example, conflicts between free movement rules and culture or other areas of Member States’ competence. This was not however sufficient for the constituent power to exclude an autonomous action by the Member State regarding the internal market.²⁰⁶ Townley argues that the same is true in relation to the competition field. In this area, it is not necessary to exclude all national action. On the contrary, he argues that “[e]nforcing national competition law (e.g. deterring cartels within a Member State) can even contribute to the EU’s economic interests (deter EU cartels and encourage intra-EU Trade).²⁰⁷ The ontological rationale thus does not require the competence of the EU in competition to be exclusive.

As to the functional rationale, it was for example, the rationale behind the CJEU classification of the EU competence regarding common commercial policy. The CJEU considered that:

“Such a policy is conceived in that Article [113 EC Treaty] in the context of the operation of the common market, for the defence of the common interest of the Community, within which the particular interests of the Member States must endeavour to adapt to each other. Quite clearly, however, this conception is incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the Community. In fact, any unilateral action on the part of the Member States would lead to disparities in the conditions for the grant of export credits, calculated to distort competition between undertakings of the various Member States in external markets. Such distortion can be eliminated only by means of a strict uniformity of credit conditions granted to undertakings in the Community, whatever their nationality. (...) To accept that the contrary were true would amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question

²⁰⁴ Ibid, 22.

²⁰⁵ Article 4 TFEU.

²⁰⁶ Similarly, Schütze, 'Dual Federalism Constitutionalised: The emergence of Exclusive competence in the EC legal Order', 22. Also, Monti, 'Legislative and Executive Competence in Competition Law', 108 and 209.

²⁰⁷ Townley, 'Constitutional limits to diversity (and Co-ordinated diversity) in EU competition law', 31.

*the mutual trust within the Community and prevent the latter from fulfilling its tasks in the defence of the common interest.*²⁰⁸

According to Townley, it would not be reasonable to apply this criterion to the classification of the competence in competition matters as exclusive, on the grounds that wherever the Member States act they create a potential for conflict and therefore, for distortion of competition.²⁰⁹ On this basis, the exclusion of Member States' competence would then always be justified. Schütze considers that the "constitutional drafters seem to have fallen victim to a logical fallacy," and asks "what distinguishes competition rule from the establishment of all other rules necessary for the functioning of the internal market?"²¹⁰ Townley considers that it would be highly problematic if legislative competence is held to be an exclusive competence of the EU. This is because Member States would not be able to maintain national competition law in force. Moreover, national competition authorities would only be able to enforce EU competition law if this was mandated by the EU. While this would create a kind of uniformity which would increase the scope of EU law, and possibly the deterrence of anti-competitive behaviour by undertakings, it would be done at the cost of diversity. The possibility of the Member States balancing public goals in the enforcement of competition provisions would be lost.²¹¹ Therefore, Townley concludes that competition should not be an exclusive competence of the EU. Finally, he asks whether competition could be a shared competence in the EU legal order. He concludes it could. This is because, first, the EU tends towards a model of co-operative federalism, i.e. a model where areas of competences cannot be isolated and which forces joint-decision making, rather than a model of dual-federalism, where areas of jurisdictions are "constitutional guaranteed

²⁰⁸ Opinion of the Court of 11 November 1975, *Arrangement OCDE - Norme pour les dépenses locales*, Opinion 1/75, EU:C:1975:145.

²⁰⁹ Townley, 'Constitutional limits to diversity (and Co-ordinated diversity) in EU competition law', 33.

²¹⁰ Robert Schütze, *European Constitutional Law* (Cambridge University Press 2012), 165.

²¹¹ Townley, 'Constitutional limits to diversity (and Co-ordinated diversity) in EU competition law', 37-38.

monopolies.”²¹² Secondly, before the Treaty of Lisbon, competition seemed to be an area of shared competence and it would be against the goal of that Treaty to limit EU powers, if a shared competence had become an exclusive one.²¹³ I agree with Townley’s analysis that there is no valid ontological or functional rationale that could support the exclusive nature of the EU competence in competition. I also add another argument in support of his claims.

Membership of the European Union requires Member States to have national competition laws. The role of national competition laws in the accession process is well illustrated by the 2004 and 2007 enlargement process, as showed by Cseres.²¹⁴ She argues that this enlargement process has been “bigger, more intrusive and transformative than earlier enlargements in the 1990s”²¹⁵ and that the influence on domestic legal systems was “more comprehensive”, as it interacted with “market, constitutional and institutional reforms.”²¹⁶ Cseres claims that the area of competition is perhaps the “strongest illustration of this process.”²¹⁷ The legal, economic and political conditions for accession firstly laid down in the so-called Copenhagen criteria by the 1993 Copenhagen European Council included “a functioning market economy and the ability to cope with competitive pressure and market forces within the EU.”²¹⁸ Competition law and policy have become instrumental for

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Kati J. Cseres, 'Accession to the EU's competition law regime: a law and governance approach' (2013) Working Paper Series 2013 – 07 Amsterdam Centre for European Law and Governance ; Kati J. Cseres, 'The impact of Regulation 1/2003 in the New Member States' (2010) 6 Competition Law Review ; Marjo Ojala, *The competition law of Central and Eastern Europe* (Sweet & Maxwell 1999); Geradin. Damien and David Hery, 'Competition Law in the New Member States - Where Do We Come From? Where Do We Go?' in Damien Geradin (ed), *Modernisation and enlargement: two major challenges for EC Competition Law* (Intersentia 2005); Michael Fritsch and Hendrik Hansen, *Rules of competition and East-West integration* (Kluwer Academic Publishers 1997).

²¹⁵ Cseres, 'Accession to the EU's competition law regime: a law and governance approach', 4.

²¹⁶ Ibid.

²¹⁷ Cseres speaks about “Europeanisation” of the candidate countries of Eastern Europe, i.e. as “there reorientation of politics in the domestic arena in ways that reflect policies, practices or preferences advanced through the EU system of Governance, *ibid*.”

²¹⁸ European Council Meeting at Copenhagen on June 21 and 22, 1993 ((1993) 6 EC Bull. Point 1.13). The criteria were then laid down with more detailed in the White paper: preparation of the associated countries of Central and Eastern Europe for integration into the Internal Market of the Union, COM (95) 163, May 1995. Since the Treaty of Lisbon, Article 49 TEU specifically mentions that “the

accession.²¹⁹ This required a considerable effort of adaptation and adjustment to the EU legal order by the administratively planned economies of Central and Eastern Europe.²²⁰ In this process “the implementation of competition law and policy were of great importance in creating a market economy and showing the commitment of these countries to market economy, competition advocacy and fair market practices.”²²¹ Once the accession process is concluded, Member States remain competent to apply their national competition laws.²²²

Despite concluding that neither the ontological or the functional rationale could justify the classification of the EU’s competence to establish the competition rules necessary for the functioning of the internal market as exclusive, Townley however concludes that the legislative competence of the EU has become exclusive under the Treaty of Lisbon.

I turn now to the analysis of the arguments put forward by the authors that are on the other side of the argument and consider the competence of the EU under Article 3(1)(b) TFEU less contentious. Dashwood argues that the way the Treaty phrases the competence of the EU under Article 3(1)(b) TFEU is “technically inept”²²³ and that it limits to state the obvious. That is because of two main reasons. According to Dashwood, there is no need to be told that the

conditions of eligibility for accession agreed upon by the European Council shall be taken into consideration.” Currently, those are the Copenhagen criteria.

²¹⁹ “[C]onditionality is a bargaining strategy of reinforcement by reward, under which the EU provides external incentives for a target government to comply with its conditions.” Frank Schimmelfennig and Ulrich Sedelmeier, ‘Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe’ (2004) 11 *Journal of European Public Policy*, 669.

²²⁰ The challenge was much lower regarding the 1995 enlargement to Austria, Finland and Sweden, that were all members of EFTA and part of the EEA Agreement under which the EFTA States had to adopt a system of competition rules, that included an administrative and judicial system for the enforcement of those rules. See Roger J. Goebel, ‘The European Union grows: the constitutional impact of the accession of Austria, Finland and Sweden’ (1995) 18 *Fordham International Law Journal* 1092 1106. Moreover, though Finland and Sweden traditionally had governments with strong socialist features and large scale of public ownership in the private sector, the Commission’s opinion concluded that each country satisfied the free market economy precondition stated in Article 3a EC Treaty (added by the Maastricht Treaty). Commission opinion on Finland’s application for Membership, 25 E.C. Bull., no. 6m sup. 25; Commission Opinion on Sweden’s Application for Membership, 25 E.C. Bull.no. 5, at 9-10, 20-21.

²²¹ Cseres, ‘Accession to the EU’s competition law regime: a law and governance approach’, 5.

²²² Article 104 TFEU.

²²³ Dashwood, ‘The relationship between Member States and the European Union/European Community’.

EU alone is competent to establish the competition rules applicable through the internal market. Member States do not have such power. Second, under *Walt Wilhelm*²²⁴ the national rules on competition must be applied in a way which does not interfere with the uniform application of the EU rules, not so much because competition is an area of *a priori* exclusive competence, but because of the application of the principle of sincere cooperation in Article 4(3) TEU.²²⁵ I do not agree with Dashwood, as it does not seem to follow conclusively from his arguments that the EU competence on competition is exclusive. As to the argument that there is no need to say that only the EU has competence to enact competition rules with effect across the entire internal market, there is no such need indeed. Member State jurisdiction is limited to the respective territory. However, the limited jurisdictional scope of Member State action has no impact on the nature of their competence. Member States do not have the power to establish rules applicable across the internal market, even in matters that have remained under their exclusive competence. Furthermore, as previously submitted, the existence of an exclusive competence cannot be established by reference to the functioning of the internal market.²²⁶ If the fact that only the EU has competence to adopt rules applicable across the entire internal market was a relevant criteria to establish an exclusive competence, then the competence regarding the internal market itself would need to be under the exclusive competence of the EU. The Treaty did not follow this road, as competence in the internal market is shared under Article 4(2)(a) TFEU.²²⁷

Against Dashwood's view I would argue however that the reference to EU competence under Article 3(1)(b) TFEU is not "technically inept." His argument seems to ignore the conferral

²²⁴ Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4.

²²⁵ Dashwood, 'The relationship between Member States and the European Union/European Community', 72.

²²⁶ Schütze, 'Dual Federalism Constitutionalised: The emergence of Exclusive competence in the EC legal Order', 21-22; Townley, 'Constitutional limits to diversity (and Co-ordinated diversity) in EU competition law'.

²²⁷ See in this sense, Schütze, *European Constitutional Law*; 165-166; Townley, 'Constitutional limits to diversity (and Co-ordinated diversity) in EU competition law', 32.

function of Article 3 TFEU. Article 3 TFEU, as well as Articles 4, 5 and 6 TFEU, have a general constitutional conferral role. Under the principle of conferral, the EU only has the competences that have been conferred to it by the Member States and must exercise them according to the objectives established in the Treaties.²²⁸ Given the constitutional role of Article 3(1)(b) TFEU the expression “necessary for the functioning of the internal market” is a constitutive element of the powers conferred to the EU, limiting their scope. Had the Treaty not introduced this limitation under Article 3(1)(b) TFEU, it could be argued that Member States had conferred unlimited competence to the EU to legislate on competition law. They did not. They limited the powers conferred on the EU under Article 3(1)(b) TFEU to those “necessary for the functioning of the internal market.”

Dashwood’s second argument grounded on the principle of sincere cooperation also does not stand. The fact that under this principle, national rules on competition must be applied in a way that does not interfere with the uniform application of the EU law says nothing on the nature of the EU competence in this area.

Article 4(3) TEU requires Member States to:

“[t]ake any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union;”

and to:

“[f]acilitate the achievement of the Union’s task and refrain from any measure which could jeopardize the attainment of the Union’s objective.”

The principle of sincere cooperation frames the whole relation between Member States and the EU, independently of the nature of their competences. It binds all the authorities of the Member States, even in matters within their jurisdiction,²²⁹ including courts and

²²⁸ Article 5(2) TEU.

²²⁹ Judgement of 8 October 1987, *Kolpinghuis Nijmegen*, C-80/86, EU:C:1987:431, paragraph 12.

decentralized authorities and it is not dependent on the exclusive nature of the EU competence. Also, the EU's institutions are subject to the principle of sincere cooperation in the relation with the Member States and with each other.²³⁰

Therefore, Dashwood's arguments on the competence of the EU under Article 3(1)(b) TFEU are not conclusive.

Turning now to Liannos, he considers that Article 3(1)(b) TFEU is less contentious. He states that "[A]rticle 3(c) TFEU indicates that competition law is, as before, one of the EU's exclusive competences confined to the establishment of competition rules necessary for the functioning of the internal market."²³¹ However, he provides no reasoning on why he considers that EU competence on competition was already exclusive under the Treaty of Rome. The opinion of a majority of authors is that such competence was shared.²³² I agree with the view that the competence of the EU in competition matters was shared. I argue that this is confirmed by the CJEU's approach to the competence of the EU in competition matters before the Treaty of Lisbon in competition matters. Although the list of the EU's exclusive competences was enacted under the Treaties only with the Treaty of Lisbon, the CJEU had already recognised some areas as under its exclusive competence, such as the common commercial policy and the conservation of the biological resources of the sea. In these areas the CJEU ruled out any action on the part of the Member States unless authorised by the EU. As regards common commercial policy, the Court was called to rule upon the compatibility

²³⁰ The Treaty of Lisbon explicitly provides that "[t]he institutions shall practice mutual sincere cooperation." Article 13(2) TEU.

²³¹ Lianos, 'Competition law in the European Union after the Treaty of Lisbon'.

²³² E.g. Firat Cengiz, *Antitrust Federalism* (Routledge 2013); Michael Dougan, 'The Convention's Draft Constitutional Treaty' a 'tidying-up exercise' that needs some tidying-up of its own' (2003) The Federal Trust for Education and Research Online Paper 27/03 ; Serena Rossi, 'Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and Member States?'; Schütze, 'Dual Federalism Constitutionalised: The emergence of Exclusive competence in the EC legal Order'; Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)'; Armin von Bogdandy and Jürgen Bast, 'The Federal Order of Competences' in Hart Publishing (ed), *Principles of European Constitutional Law* (2011).

with the Treaty of a draft Understandings on a Local Cost Standard drawn up under the auspices of the OECD (the Understanding). More specifically the question was whether the EU had the power to conclude the said Understanding and, if so, whether that power was exclusive to the EU. In its Opinion 1/75²³³, the Court considered that the subject matter of the standard, and therefore of the Understanding, “is one of the measures belonging to the common commercial policy prescribed by [then] Article 113 of the Treaty.”²³⁴ It then excluded the possibility of the exercise of concurrent powers by the EU and the Member States, concluding that:

“It cannot be accepted that, in a field such as the one governed by the Understanding in question, which is covered by export policy and more generally by the common commercial policy, the Member States should exercise a power concurrent to that of the Community, in the Community sphere and in the international sphere. The provision of [then] Articles 113 and 114 concerning the conditions under which, according to the Treaty, agreements on commercial policy must be concluded show clearly that the exercise of concurrent powers by the Member States and the Community in this matter is impossible.”²³⁵

Later, in *Donckerwolke* the Court held that

“as full responsibility in the matter of commercial policy was transferred to the Community, by means of [then] Article 113(1) measures of commercial policy of a national character are only permissible (...) by virtue of a specific authorisation by the Community.”²³⁶

In the field of conservation of the biological resources of the sea, in *Cornelis Kramer and Others* the Court was called to assess the authority of the Member States to assume and enforce international commitments within the framework of the North-East Atlantic Fisheries Convention in respect of the conservation of the biological resources of the sea during the transitional period established by Article 102 of the Accession act. The CJEU ruled

²³³ Opinion of the Court of 11 November 1975, *Arrangement OCDE - Norme pour les dépenses locales*, Opinion 1/75, EU:C:1975:145.

²³⁴ *Ibid*, at 1363.

²³⁵ *Ibid*, at 1364.

²³⁶ Judgment of 15 December 1976, *Donckerwolke and Others v Procureur de la République and Others*, Case 41-76, EU:C:1976:182.

out the possibility of any Member State action after the elapsing of the transitional period established by Article 102 of the Accession act, i.e. 1 January 1979.²³⁷ The Court emphasized that, while at the time of the matters Member States had the power to assume such commitments and therefore to enforce them, that competence was of transitional nature.²³⁸

The Court confirmed its approach to Member States' powers in the field of conservation of the biological resources of the sea in *Commission v. United Kingdom*.²³⁹ This case concerned an action brought by the Commission against the United Kingdom for failure to fulfil its obligations under the Treaty. The UK took unilateral measures regarding sea fisheries after the expiration of the Transitional period as the Council had failed to do so under Article 102 of the UK's Act of Accession. The United Kingdom claimed that as long as the Council had not exercised the powers conferred upon it by Article 102 of the Act of Accession, even after the expiration of the period laid down in that Article, the Member States retained residual powers and duties until the Community has fully exercised its powers.²⁴⁰

The Court, however considered that:

*"Since the expiration on 1 January 1979 of the transitional period lay down by Article 102 of the Act of Accession, power to adopt, as part of the common fisheries policy, measures related to the conservation of the resources of the sea has belonged fully and definitively to the Community."*²⁴¹

As a consequence,

"Member States are therefore no longer entitled to exercise any power of their own in the matter of conservation measure in the waters under their jurisdiction. The

²³⁷ Judgement of 14 July 1976, *Cornelis Kramer and Others*, Joined cases 3, 4 and 6/76, EU:C:1976:114, paragraph 41.

²³⁸ Ibid. Article 102 of the Accession Act provides that from the sixth year after accession at the latest the Council "shall determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea."

²³⁹ Judgment of 5 May 1981, *Commission v United Kingdom*, Case 804/79, EU:C:1981:93.

²⁴⁰ Ibid, paragraph 14.

²⁴¹ Ibid, paragraph 17.

*adoption of such measures, with the restrictions which they imply as regards fishing activities, is a matter, as from that date, of community law.*²⁴²”

The fact that the Council had not adopted the conservation measures referred to by Article 102 of the Act of Accession, within the required period, could not in any case restore to the Member States the power and freedom to act unilaterally in this field.²⁴³ The Court then considered that nevertheless it could not be entirely impossible for the Member States to amend the existing conservation measures due to the development of the relevant biological and technological facts in this sphere.²⁴⁴ Such amendment though could not amount to a new conservation policy on the part of a Member State, as the power regarding such policy belongs now to the Community institutions.²⁴⁵ Moreover, the CJEU stated that the measures could only be adopted by means of all the available elements of law and by having regard to the structural principles on which the Community is founded. These principles require the Community to retain in all circumstances the capacity to comply with its responsibilities subject to the observance of the essential balance intended by the Treaty.²⁴⁶ The Court then concluded that in a situation characterized by the inaction of the Council and by the maintenance of the conservation measures in force at the expiration of the transitional period, a Member State has the obligation to undertake consultations with the Commission and to seek its approval in good faith. These consultations must be undertaken in a way which allows the Commission to exercise properly its duty of supervision in pursuance of then Article 155 of the Treaty Establishing the European Economic Community (EEC Treaty). The Member States also had a duty not to lay down conservative measures in case of objection reservations or conditions which might be formulated by the Commission.²⁴⁷

²⁴² Ibid, paragraph 18.

²⁴³ Ibid, paragraph 20.

²⁴⁴ Ibid, paragraph 22.

²⁴⁵ Ibid.

²⁴⁶ Ibid, paragraph 23.

²⁴⁷ Ibid, paragraph 31.

From the above-mentioned case, it is clear that in the areas which the CJEU considered were under the exclusive competence of the EU:

- Member States could not exercise concurrent power to that of the Community, neither on the national nor on the international spheres;²⁴⁸
- National measures were possible only if authorised by the EU,²⁴⁹ or
- If the EU has failed to act and measures were needed. In any case, the adoption of national measures could not be considered as if the powers of the Member States had been restored, nor could they amount to a new policy of the part of the Member States as the power remained at the European Economic Community (EEC) level.²⁵⁰

This contrast with the CJEU's approach to competence in the field of competition. For example, the CJEU held that:

- EU law and national competition laws are applicable simultaneously to practices affecting trade between Member States,²⁵¹
- The CJEU has never considered that practices affecting trade between Member States were a matter of community competition rules alone. On the contrary, it has considered that the competence of the Member States was implied in Article 103(2)(e) TFEU;²⁵²
- In case of conflict between national competition law and the Treaty's competition provisions, EU law prevails under the general principle of primacy of EU law;²⁵³

²⁴⁸ Ibid, paragraph 20.

²⁴⁹ Ibid, paragraph 27.

²⁵⁰ Ibid, paragraph 22.

²⁵¹ Since, Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4.

²⁵² Judgment of 6 April 1962, *De Geus en Uitdenboger v Bosch and others*, Case 13/61, EU:C:1962:11. See also Freeman, 'The division of powers between the European Communities and the Member States'.

²⁵³ Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4. See also Pescatore, 'Public and Private aspects of European Community Competition Law'.

- Member States can keep stricter national competition laws;²⁵⁴
- The obligation of Member States not to jeopardise the full and uniform application of community competition law by introducing or keeping into force legislation that may render ineffective the competition rules applicable to undertaking existed only where a clear competition policy of the Commission regarding a certain area already existed.²⁵⁵

It is, therefore, in my view difficult to maintain that the CJEU considered EU competence on competition matters exclusive before the Treaty of Lisbon, and that Article 3(1)(b) TFEU kept things as they were before.

2. The system of competences introduced by the Treaty of Lisbon

We have seen that none of the arguments analysed in the previous section are able to sustain an exclusive legislative competence of the EU under Article 3(1)(b) TFEU. An analysis of the competence of the EU under this provision must be done within the overall scheme of the Treaties. Only then can we have a full understanding on the scope of that competence.

The Treaty of Lisbon grounded the system of EU competences on three fundamental principles, enshrined in Articles 4 and 5 TEU: the principle of conferral, the principle of subsidiarity and the principle of proportionality. The principle of conferral governs the limits of EU competence, while the principles of subsidiarity and proportionality govern the exercise of that competence.²⁵⁶ These principles have always been inherent to the EU

²⁵⁴ Judgment of 10 July 1980, *Procureur de la République v Giry and Guerlain*, Joined cases 253/78 and 1 to 3/79, EU:C:1980:188.

²⁵⁵ Judgment of 10 January 1985, *Leclerc v Au blé vert*, Case 229/83, EU:C:1985:1. In *Cassis de Dijon*, regarding the freedom of circulation of goods, the CJEU had the similar type of approach, recognizing a significant leeway to Member States due to the minimal nature of the EU law. Judgment of 20 February 1979, *Rewe v Bundesmonopolverwaltung für Branntwein*, Case 120/78, EU:C:1979:42.

²⁵⁶ Article 5(1) TEU.

constitutional order,²⁵⁷ being introduced as “express organising principles”²⁵⁸ for the system of EU competences under the TEU. Of particular relevance in this context of establishing the competence of the EU is the principle of conferral.

Under the principle of conferral,

*“[t]he Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.”*²⁵⁹

Furthermore,

*“[The] competences not conferred upon the Union in the Treaties remain with the Member States”.*²⁶⁰

The areas of, delimitation of, and arrangements for, the exercise of the EU competences are determined by the TFEU.²⁶¹ The EU competences are organized under the TFEU into four different categories: shared, exclusive, coordinating and complementary competences.

Shared competence is the default position for EU competence. Under Article 4(1) TFEU, if a competence of the EU is found in the Treaties and the Treaties do not provide otherwise, that competence is shared. An exemplificative list of areas of shared competence is provided in Article 4 TFEU that includes, *inter alia* the internal market, economic, social and territorial cohesion, consumer protection, transport, energy and the area of freedom, security and justice. Under Article 2(2) TFEU where the Treaties confer to the EU a shared competence, both Member States and the EU may legislate and adopt legally binding acts.²⁶²

²⁵⁷ See Takis Tridimas, *The General Principles of EU Law* (Oxford University Press 2006).

²⁵⁸ Alan Dashwood and others, *Wyatt and Dashwood's European Union law* (6th edn, Hart 2011), 98.

²⁵⁹ Article 5(2) TEU.

²⁶⁰ Article 4(1) TEU.

²⁶¹ Article 4(1) TFEU.

²⁶² The list provided in Article 4(2) TFEU is not exhaustive. It refers in this respect to “the following principle areas.”

Areas under the exclusive competence of the EU are identified in Article 3 TFEU. They include, *inter alia*, “the establishing of the competition rules necessary for the functioning of the internal market.”²⁶³ Contrarily to the areas of shared competence, the list provided in Article 3 TFEU is closed. Only the areas that are specifically identified in the referred list are exclusive to the EU. Under Article 2(1) TFEU, “[w]here the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if empowered by the Union or for the implementation of the Union’s act.”

Article 5 TFEU establishes areas where the EU has a coordinating competence. Those areas are “economic policy”, “employment policy” and “social policy.” It has been argued that this competence is the result of the lack of consensus in the European Convention to place these areas under shared or complementary competence of the EU.²⁶⁴ Under this competence the EU may provide arrangements for the Member States to coordinate the exercise of their competences. Under Article 6 TFEU, the EU has competence to carry out actions to support, coordinate or supplement the actions of the Member States in areas of (a) protection and improvement of human health, (b) industry, (c) culture, (d) tourism, (e) education, vocational training youth and sport, (f) civil protection and (g) administrative cooperation. Conflicts under coordinating and supporting competences are solved by giving primacy to the Member States action. A harmonized intervention by the EU is even specifically excluded in the case of coordinating competences. Under Article 2(5) TFEU, legally binding acts of the EU in those areas cannot entail harmonization of Member States’ laws or regulations.

²⁶³ Article 3(1)(b) TFEU.

²⁶⁴ See, Paul Craig, ‘Competence: clarity, conferral, containment and consideration’ (2004) 29 *European Law Review*, 29; Schütze, *European Constitutional Law*, 167.

Articles 3 to 6 TFEU are not enough for the EU to act. The technique employed in the Treaties to attributing powers to the EU is highly specific.²⁶⁵ Under article 2(6) TFEU a legal basis enabling the EU to act must be found in the Treaties.

Under Article 2(6) TFEU:

“[t]he scope and the arrangements for the exercising the Union’s competence shall be determined by the provision of the Treaty related to each area.”

The legal basis for EU action plays a two-fold determinant role on the analysis of the competence conferred on the EU. First, it determines its scope. Second, it determines the way that competence is to be exercised. Diversity in the EU legal order in general and in EU competition law in particular will be a function of these two variables.

Under Article 3(1)(b) TFEU the EU has exclusive competence in “the establishment of the competition rules necessary for the functioning of the internal market.” The scope of the exclusive competence under this provision will be determined by the provision of the Treaty related to this area.

Competence outside the scope of the exclusive competence of the EU under Article 3(1)(b) TFEU is either (i) shared as per Article 4(2) TFEU, if a legal basis allowing the EU to act outside the scope of the exclusive competence is found in the Treaties, or (ii) it has remained with the Member States as per Article 4(1) TEU, since it has not been conferred to the EU under the Treaties.

The impact the scope of EU competence has on the diversity allowed in the EU legal order is not of small importance. This is particularly true in EU competition laws as, under Article

²⁶⁵ Opinion of the Court of 28 March 1996, *Adhésion de la Communauté à la CEDH*, Opinion 2/94, EU:C:1996:140. See also Dashwood and others, *Wyatt and Dashwood's European Union law*, 99.

3(1)(b) TFEU, the EU has exclusive competence in “establishing the competition rules necessary for the functioning of the internal market.”

Exclusive competences of the EU have been “definitively and irrevocably forfeited by the Member States by their straightforward transfer to the Union.”²⁶⁶ In these cases Member States can only act as agents of the EU, under a “specific authorisation.”²⁶⁷ The EU must prescribe in what ways and according to which procedure Member States can act.²⁶⁸ Competence allocated under the exclusive competence of the EU does not allow the existence of a plurality of sources of decision making, except if authorised by the EU, in which case Member States act as agents of the EU. Exclusive competence solves conflicts by conferring the final word on the EU, as only the EU may act. Diversity is therefore compromised, if not excluded. The larger the scope of an exclusive EU competence, the smaller is the scope of Member States competence, if any. Conversely, the smaller the scope of an exclusive competence is, the higher are the chances for a diverse outcome. If the EU finds a legal basis to act outside the scope of its exclusive competence, that will be in the use of a shared competence as per Article 4(2) TFEU. Shared competence allows a plurality of decision-making sources to co-exist. Both Member States and the EU may act, even if Member States “shall exercise their competence to the extent that the Union has decided to cease exercising its competence.”²⁶⁹ Depending on the extent of the scope of the EU action, that exercise of competence can give the EU a *de facto* exclusive competence in a certain area.²⁷⁰ However, this is not the same as an exclusive competence being transferred to the

²⁶⁶ Lenaerts and others, *European Union Law*, 125.

²⁶⁷ Article 2(1) TFEU.

²⁶⁸ Judgment of 15 December 1976, *Donckerwolke and Others v Procureur de la République and Others*, Case 41/76, EU:C:1976:182, paragraph 32.

²⁶⁹ Article 2(2) TFEU.

²⁷⁰ Such is the case in regard to the common transport policy. In *AETR* Court held that the Union had exercised its powers in that field in a way that “excludes the possibility of concurrent powers on the part of the Member States, since any steps taken outside that framework of the [Union] institutions would be incompatible with the Unity of the internal market and the uniform application of the [Union] law. Judgment of 31 March 1971, *Commission v Council*, Case 22/70, EU:C:1971:32.

EU within the meaning of Article 2(1) TFEU. Member States may again exercise competence to the extent that the EU has decided to cease exercise of its competence.²⁷¹ Moreover, Protocol (No 25) on the exercise of shared competence limits the pre-emptive effect of the Union's action in certain area of shared competence to the "elements governed by the Union act in question and therefore it does not cover the whole area."

If there is no legal basis for EU action to act outside the scope of its exclusive competence, then the EU has no further competence to act. Competence not conferred to the EU remains with the Member States, as per Article 4(1) TFEU, that are solely competent to act.

The degree of diversity allowed will also depend on the modalities for exercising EU competence, that in turn is determined by the legal basis enabling the EU to act.

3. Control by the Member States of the EU decision making process

The arrangements for exercising EU competence may contain what Dashwood called "conservative elements."²⁷² These are elements that allow Member States to preserve their position and thus solve conflicts in their favour, allowing for more or less chances of accommodation of conflicting views.²⁷³ Such is the case of the institutional balance, that allows the participation of the Member States at the decision-making process through the Council. This is a central conservative element allowing Member States to protect their interests in the decision-making process. Another element is the principle of subsidiarity,

²⁷¹ Article 2(2) TFEU.

²⁷² Dashwood, 'States in the European Union'. According to Dashwood "conservative elements" are distinct from "constitutional elements" such as the principles of direct effect and primacy of EU law and the set of fundamental values expressed by what the CJEU calls the general principles of EU law.

²⁷³ According to Dashwood 'conservative elements' are distinct from 'constitutional elements' such as the principles of direct effect and primacy of EU law and the set of fundamental values expressed by what the Court of Justice called the general principles of law. See *ibid*.

that requires the action to be taken at the lowest level possible and that allows the control of the EU action by the national Parliaments, in the case of legislative acts.

Voting at the Council

Member States participate in the EU legislative process through the Council and have thus the possibility to directly influence the legislative process.²⁷⁴ The voting rules at the Council are thus the factors that have the highest, though not exclusive, impact on the individual control of the EU legislative process by the Member States.²⁷⁵ The Council has been described as the “fulcrum” of the decision making and of the legislative process of the EU,²⁷⁶ reflecting the “stubborn determination of member governments in the EU to maximize their involvement in framing the decisions and shaping the legislation that would have a bearing on their polities.”²⁷⁷

The higher the majority required, the more diversity or accommodation of conflicting views in EU law is favoured. This is because of two factors. Firstly, the action at the EU level becomes more difficult, therefore, regulatory competition is favoured. Secondly, when the EU takes action, Member States have more opportunities to influence the final result and accommodate conflicting views when a high majority is required. There are three types of voting majorities in the Council for an act to be enacted: simple majority, qualified majority

²⁷⁴ The individual capacity of Member States to influence the outcome at the Council may vary from Member State to Member State though. Building on international relations literature on state power, Tallberg’s study reported on the influences both the Member States aggregated power (overall capacity of a State) as well as issue-specific power (resources of a state in a particular policy area) played a role. Testimonies he collected from European Council participants suggest that both forms of state power had a large influence in summit bargaining. For a general perspective see Jonas Tallberg, 'Bargaining Power in the European Council' (2008) 46 *Journal of Common Market Studies* .

²⁷⁵ But unanimity or common agreement still applies for important sectors such as taxation, social security and social policy, measures on passports and identity cards, some issues of operational police co-operation, the establishment of an EU public prosecutor, own resource of EU and the multiannual financial framework, the conclusion of trade agreements in certain sensitive fields as well as most measures in CFSP, including defence.

²⁷⁶ Fiona Hayes-Renshaw and Helen S. Wallace, *The Council of Ministers* (Houndmills England/Palgrave Macmillan 2006), 321.

²⁷⁷ Ibid.

and unanimity. The majority needed depends on the legal basis of the proposal.²⁷⁸ Under the simple majority each Member State at the Council has one vote. Fifteen votes are required for a measure to be adopted. Simple majority is said to not protect the interests of the Member States enough, and to favour smaller Member States over larger Member States as they have the same amount of votes.²⁷⁹ Qualified majority vote (QMV) is the default rule. Under Article 16(3) TEU, if the legal basis for enacting an act does not specify a majority, the act must be approved under qualified majority. Under this modality each Member State of the Council is attributed a number of votes, depending on the Member State's population. A measure needs 260 out of the 352 possible votes to be approved and at least 15 Member States must have voted for it. A new method to calculate the qualified majority entered into force on the 1st November 2014²⁸⁰ that lowered the thresholds for the adoption of a decision on an enlarged Council. Now a "double majority" is needed: at least 55% of the number of Member States and at least 65% of the EU's population. This formula gives greater power to the larger Member States by introducing a population requirement as a central threshold for the first time. However, smaller Member States are protected from the larger state veto by the requirement that at least four states must vote against the measure.²⁸¹

A unanimity vote is the other extreme to the simple majority. Under this modality each Member State has a veto on any legislation being considered.

The arrangements for exercising EU competence are capable of mitigating the impact of the competence conferred on the EU. For example, if the legal basis that provides an exclusive competence to the EU to act requires that action be approved under an unanimity vote at

²⁷⁸ Article 2(6) TFEU.

²⁷⁹ One significant area subject to simple majority is the decision to convene an intergovernmental conference to amend the TEU, Article 48(3) TEU. Other areas include, Articles 240(3) TFEU regarding the adoption of Council's own rules of procedure, and those of the European Council (Articles 235(3)) and to request the Commission to undertake studies f submit proposals - Article 241 TFEU.

²⁸⁰ Article 16(4) TEU.

²⁸¹ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law - Text and Materials* (3rd edn, Cambridge University Press 2014), 71.

the Council, Member States will have a considerable margin to influence the final result. They can influence the EU decision making process in a way that accommodates their conflicting positions, for example allowing exceptions under national law. For example, the EU Merger Regulation²⁸² which was adopted under an unanimity voting rule at the Council²⁸³ contains references to the protection of Member States interests²⁸⁴ and mechanisms allowing the review of mergers with an European dimension to take place at national level and not at EU level.²⁸⁵ It also establish that “Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law” such as public security, plurality of the media and prudential rules.²⁸⁶

Also, the fact that a competence is shared it does not mean that regulatory autonomy is guaranteed. This is because, as we have seen, when the EU acts, Member States then cannot act.²⁸⁷ If the legal basis enabling the EU to act does not require the involvement of the Council or it does, but under a simple majority, an action by the EU is easily achieved, and Member

²⁸² Council Regulation (EC) 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1.

²⁸³ It has a double legal basis which included then Article 308 EC Treaty (now Article 352 TFEU) requiring unanimity vote at the Council.

²⁸⁴ For example, whereas 19 of the Merger Regulation clarifies that *Furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 296 of the Treaty, and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law.*

²⁸⁵ Article 9 of Regulation 139/2004 establish a referral mechanism to the competent authorities of the Member States of mergers with an European dimension that, for example, “threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market.” (Article 9(2)(a) of Regulation 139/2004

²⁸⁶ Article 22 (4) of the Merger Regulation 139/2004, that also establish that “Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.”

²⁸⁷ Article 2(2) TFEU.

States will then be pre-empted from acting. Under this circumstance the possibilities for diversity in the EU legal under a shared competence are lower.

Unanimity voting at the Council is the arrangement for exercising EU competence that protects diversity and accommodation of divergent views the most, for two main reasons. First, unanimity is hard to reach, making an action by the EU difficult.²⁸⁸ In the presence of a conflict of views, a unanimity rule transforms all Member States into “veto players”, i.e. actors whose agreement is necessary for the change of the status quo.²⁸⁹ Therefore, where a Treaty Article requires an act to be adopted unanimously, each Member State has a decisive say in the outcome of the legislative process. Either the Council adopts the proposed legislation to which each Member State can reconcile itself, or no measure is approved. Since under the unanimity rule it is more difficult for the EU to act, then regulatory competition is favoured, in the case of shared competence. Moreover, in cases where the EU acts, due to the veto power of the Member States the probability of Member States divergent views and conflicting interest being accommodated in the EU are higher, even if competence is exclusive to the EU.

It can be argued that there is not that much difference between a qualified majority and unanimity as statistics show that even where measures only needed to be adopted by QMV they ended up being approved by unanimity.²⁹⁰ Chalmers, Davies and Monti raise this point to argue that the debate about vote weighting under the new QMV formula in force since 1 November 2014 is overblown. This is because where unanimity is not required, Member States are aware of the possibility of being outmanoeuvred and so they try to construct

²⁸⁸ It was this barrier to action that took unanimity to be replaced by QMV. See Fritz Scharpf, 'The Joint-decision trap: lessons from German Federalism and European Integration' (1988) 66 Public Administration .

²⁸⁹ George Tsebelis, *Veto players how political institutions work* (Princeton University Press 2002).

²⁹⁰ A study of the decisions taken under QMV between 2009 and 2012 that showed that 65% of the decisions under QMV were passed with full agreement.

common solutions reaching a consensus.²⁹¹ Literature on decision making at the EU Council mentions that this is due to a “preference for unanimity,”²⁹² and the existence of a culture of compromise or consensus.²⁹³ However, I believe that to conclude from here that the degree of diversity obtained under a QMV or an unanimity voting procedure is the same, is a step too far. Tsebelis studied how the EU has tried to bridge qualified majority and unanimity over the years and how qualified majorities are transformed into unanimities. He named this process of transforming a qualified majority decision into a unanimous one as “q-unanimity” decision making process.²⁹⁴ Tsebelis describes it as being a two-step process. The first step is to identify the point of a proposal that can achieve a qualified majority, i.e. that cannot be defeated by a different qualified majority. This is done by finding the points of a proposal that can achieve a qualified majority. These points constitute the “q. majority core.” Among all the points of the “q. majority core” a proposal will be made according to the preferences of the proponent, unless another preference is known to exist within the Council. In any case, the proposal will always be inside the points of the “q. majority core.” The second step is to extend the q. majority to q. unanimity. The proposal will be discussed

²⁹¹ See Chalmers, Davies and Monti, *European Union Law - Text and Materials*, 85.

²⁹² Mar Aspinwall, 'Government Preferences on European Integration: An Empirical Test of Five Theories' (2007) 37 *British Journal of Political Science*; Hegemann, 'Voting, statements and coalition-building in the Council from 1999 to 2006' in Daniel Naurin and Helen S. Wallace (eds), *Unveiling the Council of the European Union: Games Government Play in Brussels* (Palgrave Macmillan 2010); Mikko Mattila, 'Contested decisions: Empirical analysis of voting in the European Union Council of Ministers' (2004) 43 *European Journal of Political Research*; Mikko Mattila, 'Voting and Coalition in the Council after the enlargement' in Daniel Naurin and Helen S. Wallace (eds), *Unveiling the Council of the European Union: Games Government Play in Brussels* (Palgrave Macmillan 2010); Daniel Naurin and Helen S. Wallace, 'How should we best study the Council of Ministers' in Dorothee Heisenberg (ed), *Unveiling the Council of the European Union: Games Government Play in Brussels* (Palgrave Macmillan 2008).

²⁹³ Michelle Cini, *The European Commission: leadership, organisation and culture in the EU administration* (Manchester University Press 1996); Fiona Hayes-Renshaw, Wim Van Aken and Helen S. Wallace, 'When and why the EU Council of Ministers votes explicitly' (2006) 44 *Journal of Common Market Studies*; Naurin and Wallace, 'How should we best study the Council of Ministers'.

²⁹⁴ George Tsebelis, 'Bridging qualified majority and unanimity decisionmaking in the EU' (2013) 20 *Journal of European Public Policy*. The study is done, first, in relation to the procedure established under Article 31(2) TFEU and then in relation to the general procedure of proposals by the Commission. He concludes that the technique of reducing the scope of the proposal is widely used to transform a decision from qualified majority to unanimity.

with those Member States that are dissidents within the Council. As from the point of view of the qualified majority supporting the proposal, the modifications have to be minimal, the negotiations will take place around the controversial point only and not on alternative proposals to the whole proposal. Discussions will take place on what exactly they object to regarding this point and what modifications can be made to eliminate objections. Modifications must remain minimal, so the pre-existent q. majority is not disturbed. A way to achieve this is by eliminating objections through reducing the specificity of the measure. Tsebelis mentions that this is similar to that presented in law and economics²⁹⁵ literature and international law,²⁹⁶ according to which the precision of a legal text is a variable depending on the number of contractors and their heterogeneity. “Q. unanimity” to approve a proposal will thus be achieved.

From Tsebelis’ conclusions we understand that the barriers to diversity remain higher under the QMV than under the unanimity procedure, even if the Council always aims at reaching decisions with unanimous support. In a QMV procedure, the proposal is always presented within the q. majority core and the negotiations around the focal points of dissent are conducted in a way that the pre-existing QM support is not put at risk. Unanimity in this context is only a preference, not a requirement. If unanimity at the Council fails, the measure can nevertheless be approved as qualified majority will most likely be attained. Moreover, as shown by Scharpf, the introduction of QMV was necessary to overcome the problem of the joint-decision trap created by unanimity.²⁹⁷ QMV allows more flexibility in the system in order to secure the possibility of policy change.²⁹⁸ Therefore, EU action is still more likely to

²⁹⁵ Isaac Ehrlich and Richard A. Posner, 'An economic analysis of legal rulemaking' (1974) 3 *The Journal of Legal Studies* .

²⁹⁶ Barbara Koremenos, 'An Economic Analysis of International Rulemaking' (American Society for International Law).

²⁹⁷ Scharpf, 'The Joint-decision trap: lessons from German Federalism and European Integration' Fritz Scharpf, 'The joint decision trap' (2006) 44 *Journal of Common Market Studies* .

²⁹⁸ Scharpf, 'The joint decision trap'.

occur under QMV, even if the Council aims at reaching unanimous support, than if unanimity was required by the legal basis. As such, even if EU competence to act is shared, regulatory competition is more likely to be restricted under majority voting, than under unanimity. Further, diversity allowed by the EU law is likely to be more diffuse and thus indirect, as the Member States are deprived from a veto power under a QMV, having less influence over the EU decision making process.

The subsidiary exercise of EU competence

Another conservative element present in the Treaties is the subsidiarity principle that is currently embodied in Article 5(3) TEU:

“Under the principles of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedures set out in that Protocol.”

The principle of subsidiarity gives preference for the action to take place at the Member States level, and establishes mechanisms of control by the National Parliaments of the EU’s exercise of its legislative competence. It therefore favours diversity in the EU legal order.

Protocol (No 2) on the application of the principles of subsidiarity and proportionality should be read together with the Protocol (No 1) on the Role of National Parliaments in the European Union. Protocol (No 2) applies to only draft legislative acts²⁹⁹ and reinforces the non-judicial control of subsidiarity, by introducing a reasoned opinion procedure involving national Parliaments at an early stage of the legislative procedure. According to Article 6 of Protocol (No 2) introduced by the Treaty of Lisbon, any National Parliament or any chamber

²⁹⁹ Article 3.

of national Parliament may, within eight weeks from the date of transmission of the draft legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. According to paragraph 3 of Article 7 of Protocol (No 2), if the Commission decides to maintain a proposal that was the object of reasoned opinions representing at least one third of all the votes allocated to national Parliaments, the Council, by a majority of 55% or by a majority of votes cast in the European Parliament, may block the legislative proposal.

Some authors, such as Hofmann, Rowe and Türk argue³⁰⁰ that after Lisbon, the scope of the subsidiarity principle has changed and that it is not applicable to executive acts.³⁰¹ If these views are right, this would have a negative impact on diversity in EU competition law. This is because, in case of conflicting views in implementing EU competition law, as well as in balancing competition against other public policy considerations, subsidiarity gives preference to the view of Member States over the conflicting EU view, as it favours action at national level.

Their reasoning goes as follows: if under Article 5(3) TEU subsidiarity is to be applicable in accordance to the Protocol, the scope of the principle is delimited by the scope of the Protocol. As the Protocol is applicable only to legislative acts, such is the scope of application of subsidiarity as enshrined in Article 5(3) TEU. Protocols annexed to the Treaties form an integral part of the Treaties. They are therefore primary law as per Article 51 TEU. As such,

³⁰⁰ Hofman, Rowe and Türk, *Administrative Law and Policy of the European Union*, 127.

³⁰¹ Hofmann, Rowe and Türk consider this limitation as being questionable, though they argue that any subordinate implementing measures must, by their nature, remain within the compass of their enabling legislation, so that the scope available to breach the principle of subsidiarity would necessarily be quite narrow. They also refer that to the extent that the validity of an implementing measure relies upon the interpretation of a provision in enabling legislation itself subject to the principle of subsidiarity, any such interpretation would need to conform to this, thus meaning that the principle would at least indirectly affect the scope of the implementing measure. Ibid.

protocols can make changes in the Treaties and in other provisions of primary law.³⁰² This view seems supported by two other changes introduced by the Treaty of Lisbon. First, the Treaty of Lisbon gives a formal definition of legal acts which are the acts adopted by legislative procedure.³⁰³ These acts are therefore distinct from delegated³⁰⁴ and implementing³⁰⁵ acts. So it is clear that when Protocol (No 2) only refers to legislative acts, it excludes delegated or implementing acts, as, according to the Treaty's definition, they are not included in the notion of legislative acts. Secondly, the Lisbon Treaty established an autonomous legal basis concerning the exercise of the executive power of the EU, giving it constitutional foundations for the first time.³⁰⁶ According to Article 291(2) TFEU "[w]here uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing power on the Commission, or in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council." This provision seems to embody subsidiarity considerations for the exercise of the executive power, replacing Article 5(3) TEU that becomes redundant when it comes to the executive function of the EU exercised on the basis of Article 291 (2) TFEU.

However, I do not agree with this conclusion, and argue that the subsidiarity principle under the Treaty of Lisbon remains applicable to implementing acts of the EU. Article 291 TFEU has a conferral role that is distinct from and upstream to the subsidiarity principle. Article 291 TFEU sets the condition for the "existence" of the implementing powers of the EU, while Article 5(3) TEU establishes the conditions for the "exercise" of those powers. The introduction of the subsidiarity principle made clearer the distinction between the

³⁰² Judgment of 27 June 2001, *Leroy and Others v Council*, Joined cases T-164/99, T-37/00 and T-38/00, EU:T:2001:170, paragraph 67.

³⁰³ Article 289 (3) TFEU.

³⁰⁴ Article 290 TFEU.

³⁰⁵ Article 291 TFEU.

³⁰⁶ Schütze, 'From Rome to Lisbon: Executive federalism in the (new) European Union', 1397.

competences of the EU and the powers of the EU,³⁰⁷ or between the existence of competence and the use of such competence.³⁰⁸ The EU is based on attributed power, being the general principle that the EU only has the competence conferred on it by the Treaties. If before the introduction of the subsidiarity principle an EU action was only subordinated to the existence of a legal basis,³⁰⁹ the introduction of the subsidiarity principle rendered competence insufficient for the EU to take action.³¹⁰ Subsidiarity is a threshold for the EU's action based on the fact that, by reason of the scale or effects of the proposed action, the action is better achieved at EU level. Apart from the legal basis for action, another condition must be met: the fact that the objectives of the proposed action cannot be sufficiently achieved by the Member States. Therefore, Article 291 TFEU does not replace Article 5(3) TEU when it comes to the executive function of the EU. Furthermore, there are several arguments against the application of the principle of subsidiarity to EU legislative acts only that favour its applicability also to EU implementing act.

4. Executive subsidiarity

To limit the application of the subsidiarity principle to legislative acts raises some criticisms. First, despite the distinction introduced by the Treaty of Lisbon between legislative acts, on the one hand, and delegated and implementing acts on the other hand, I argue that the Protocol (No 2) does not limit the scope of the subsidiarity principle. The fact that the Protocol (No 2) is only applicable to legislative acts only means that the criteria established therein are not applicable to delegated and implementing acts and that these acts are left without political control by the national parliaments. Second, a limitation of the subsidiarity

³⁰⁷ Koen Lenaerts and Patrick Van Ypersele, 'Le principe de subsidiarité et son contexte : étude de l'article 3 B du Traité CE' (1994) 1-2 Cahiers de droit européen .

³⁰⁸ Paul Craig, *EU Administrative law* (Oxford University Press 2012), 392.

³⁰⁹ Lenaerts and Van Ypersele, 'Le principe de subsidiarité et son contexte : étude de l'article 3 B du Traité CE', 35.

³¹⁰ Ibid.

principle to legislative acts is incompatible with a teleological interpretation of Article 5(3) TEU. Delegated and implementing acts are subordinated acts vis-à-vis legislative acts. If the authorising act must observe the subsidiarity principle it is difficult to argue that delegated and implementing acts do not. Finally, I will argue that the limitation of the subsidiarity principle to legislative acts does not take into consideration the role that subsidiarity plays as a general principle of EU law. I will explore these three points next.

Protocol (No 2) on the application of the principles of subsidiarity and proportionality

Protocol (No 2) establishes guidelines for applying the principle of subsidiarity and for political control. The CJEU has expressly stated that the “Protocol lays down guidelines for the purpose of determining whether [the] conditions [laid down in Article 5(3) TEU and former Article 5(2) TEU] are met.”³¹¹ The protocol is not used to determine the scope of application of the principle of subsidiarity: that is determined by Article 5(3) TEU itself. A limitation on the application of the subsidiarity principle to certain acts of the EU does not flow from Article 5(3) TEU. Article 5(3) TEU refers to any action of the EU and it has been understood since the beginning that it is not limited to legislative action.³¹² The distinction

³¹¹ Judgment of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others v Commission*, C-176/06 P, EU:C:2007:730, paragraph 72.

³¹² Clause-Dieter Ehlermann, 'Quelques réflexions sur la communication de la Commission relative au principe de la subsidiarité' (1992) 4 *Revue du Marché Unique Européen*, 215. This interpretation is coherent with the history of the subsidiarity principle in the context of the EU Treaties. Although the idea of subsidiarity in the European debate can be traced back to the early 70's, the first attempt to introduce it into the Treaties was only achieved in the final version of the Draft Treaty, adopted by the European Parliament on the 14th February 1984 as a blueprint for Community Reform. Draft Treaty Establishing the European Union 14 February 1984 OJ 1984 C 77/33. The Draft Treaty contributed to the coming into existence of the Single European Act (SEA) in 1985, though the formulation of the subsidiarity principle proposed in the Draft Treaty was not incorporated exactly into the SEA since the latter did not contain the word “Subsidiarity.” It was with the Maastricht Treaty, in 1992, that the principle of subsidiarity found its formal expression in the European Treaties. It was mentioned in the second penultimate recital in the preamble of the Treaty of the European Union (expressly), Article A(2) TEU (implicitly), Article B(2) TEU (expressly) and last, Article 3b(2) EC. In the first case (Article A TEU), subsidiarity appears to mean that the decision in the European Union should be taken “as closely as possible to the citizens, presumably at the level of the local government whenever possible.” Meanwhile, Article 3(b) TEU presents subsidiarity as a procedural device for dividing competences between the European Union and its Member States accordingly to the criteria of which can perform specific actions most efficiently. Again, no distinction between legislative and non-legislative acts was

introduced by Article 5(3) TEU should be interpreted as concerning the mechanisms of control as foreseen in the Protocol but not the type of EU action to which these principles are applicable.

Up to this point the control of subsidiarity was limited to the ex-post judicial control by the European Courts under Article 230 TEU (now 263 TFEU) or under Article 234 TEU (now 267 TFEU) in the case of an individual attack on the validity of EU action before a national court on the grounds of violation of subsidiarity principle.³¹³ The mechanisms of control of the subsidiarity principle came under special attention during the drafting of the European Convention. The Working Group on Subsidiarity (Working Group I) identified the need to improve the mechanisms of control of subsidiarity, and in its final report³¹⁴ stressed the need for ex-ante political monitoring of the respect of subsidiarity regarding the legislative initiatives of the EU. The system of ex-ante political monitoring covered only the legislative initiative of the EU and granted powers to the national parliament in this respect. The current wording of Article 5(3) TEU and of Protocol (2) matches the wording of the Draft Treaty Establishing a Constitution for Europe (Draft Constitutional Treaty) that resulted from the European Convention.³¹⁵ On no occasion during the European Convention was the

made in the several references made therein to the subsidiarity principle. The Treaty of Amsterdam that contained a protocol on the application of the principle of subsidiarity and proportionality also did not make a distinction between the acts. For a complete reference to the history of the subsidiarity principle see Kendo Endo, 'The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors' (1994) 43 Hokkaido Law Review .

³¹³ Paragraph 1 of the Protocol on the application of the principles of subsidiarity and proportionality annexed to the EC Treaty only mentioned that “[i]n exercising the power conferred on it each institution shall ensure that the principle of subsidiarity is complied with.” No mechanism of control was defined.

³¹⁴ Final Report of the Working Group on Subsidiarity, October 23, 2002, CONV 266/02.

³¹⁵ The subsidiarity principle is mentioned in paragraph 3 of Article I-11 “Fundamental principles” as follows: *Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States either at central level or at regional and local level, but can rather, by reason of scale and effects of the proposed action be better achieved at Union level. The institutions of the Union shall apply the principles of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedures set out in the Protocol.*

application of subsidiarity to all actions of the EU questioned. For example, the Final report of the Working Group on Complementary Competencies of the European Convention (Working Group V), referring to Legislative and Non-legislative actions of the EU in areas of complementary competences, identified the principle of subsidiarity among others, such as proportionality and primacy, as a principle governing the exercise of (all) competences.³¹⁶ After Lisbon, the mechanisms of control are of two types. First, the traditional ex-post mechanisms of judicial control by national and European Courts that applies to both legislative and non-legislative EU act.³¹⁷ As regards legislative acts, this mechanism has been reinforced by Protocol (No 2). Under Article 8 of the Protocol, National Parliaments or a chamber thereof must now have the possibility to bring an action before the CJEU. Also, under the same provision of the Protocol, the Committee of the Regions may bring an action under Article 263 TFEU before the CJEU against acts for the adoption of which the TFEU provides that it be consulted. Secondly, ex-ante mechanisms of political control applicable only to the EU's legislative acts are introduced by the Protocol. The Protocol reinforced the non-judicial control of subsidiarity, by introducing a reasoned opinion procedure involving the national Parliaments at an early stage of the legislative procedure.³¹⁸ For that purpose, the EU's institutions are now required to send their draft legislations and amended drafts to the national parliaments. Member States now have access through their National Parliaments to more information on the EU's legislative process and can be involved in it. The fact that the Protocol applies to only draft legislative acts means that there is no mechanism for checks by national parliaments on non-legislative acts, even if they are felt to

³¹⁶ Final Report of the Working Group on Complementary Competencies, November 4, 2002, CONV 375/1/02 REV 1, p. 12 -13.

³¹⁷ Articles 263 and 267 TFEU.

³¹⁸ By the end of 2010 the Commission has sent out 82 draft legislative proposals falling within the scope of the Protocol and received 211 opinions. A total of 34 raised subsidiarity concerns, for five legislative proposals the Commission received more than one reasoned opinion, but in none of the cases the threshold for a "yellow" card was far from being reached.

infringe subsidiarity.³¹⁹ However, no conclusion on the scope of the application of subsidiarity principle as laid down in Article 5(3) TEU can be drawn from this.

Teleological interpretation of Article 5(3) TEU

A teleological interpretation of Article 5(3) TEU favours the conclusion that the subsidiarity principle should also apply to delegated and implemented acts, as they are subordinate acts. The authorisation to issue a delegated or implementing act under Articles 290 or 291 TFEU constitutes the legal basis for a subordinate measure, thereby establishing a hierarchy between the authorizing act and the delegated/implementing act.³²⁰ If the authorising act must observe the subsidiarity principle it is hard to accept that the subordinated delegated or implementing acts do not. The argument that in any case the possibility that a delegated or implementing act violates subsidiarity is remote, as those acts must by their nature remain within the scope of their enabling legislation³²¹ that is itself subject to subsidiarity, is weak. For example, as concerns delegated acts, though under Article 290 TFEU the legislative act must laid down the essential principles of an area and contain the substantive criteria such as the objectives, content and scope of the delegation of powers, some discretion is left to the enactment of the delegated act, particularly since the CJEU has consistently limited its review of legislative discretion to whether there has been a “manifest error of misuse of power” or whether the institution have manifestly exceeded the limits of discretion.”³²² Moreover, the distinction between legislative and non-legislative acts introduced by the Treaty of Lisbon “should not however mask the fact that delegated acts will often be legislative in nature, in the sense that they will lay down binding provisions of general

³¹⁹ In this sense see Paul Craig and Gráinne de Búrca, *EU Law Text, Cases and Materials* (Fourth Edition edn, Oxford University Press 2008), 96.

³²⁰ Hofman, Rowe and Türk, *Administrative Law and Policy of the European Union*, 121.

³²¹ Ibid, 127.

³²² Herwing C.H. Hofman, 'Legislation, delegation and implementation under the Treaty of Lisbon : typology meets reality' (2009) 15 *European Law Journal* , 489; Craig and Búrca, *EU Law Text, Cases and Materials*, 137.

application to govern a certain situation.”³²³ Finally, it shall also be noted that after the Treaty of Lisbon, delegated acts are not subject to the comitology procedure,³²⁴ thereby weakening the control of the delegated act by the Member States. This makes even more urgent the need of a subsidiarity control of the delegated act.

As to implementing acts, under Article 291 TFEU, the discretion of the EU is not necessarily limited. Despite the choice between a delegated or implementing act being made at an early stage, in practice the distinction is that the implementing acts normally executes the legislative act without amendment or supplementation. As such, it is not possible to understand until the act is made whether it is delegated or implemented, as any draft measure may be changed prior to final enactment. This may take the measure from the category of delegated to implementing act and vice versa.³²⁵ Furthermore, the Commission has signalled that it will take subsidiarity concerns into account into in relation to delegated and implementing acts in the context of political dialogue with national parliaments.³²⁶

Subsidiarity principle as a general principle of EU law

The nature of the subsidiarity principle as a general principle of EU law makes it applicable to all acts of the EU, i.e. legislative or non-legislative acts, in the exercise of its shared powers. The peculiarity of subsidiarity is that it is a written principle that was put forward in writing by the Member States without having been discovered first by the CJEU.³²⁷ This may raise

³²³ Craig, *EU Administrative law*, 126.

³²⁴ For an argument favoring the survival of comitology for delegated acts see Paul Craig, *The Lisbon Treaty, Law, Politics, and Treaty Reform* (Oxford University Press 2011), 58-59. Though, Craig considers that the contrary interpretation, i.e. the non-application of comitology to delegated acts best fits the wording of Article 290 TEU see Craig, *EU Administrative law*, 126.

³²⁵ Some authors pointed out that there is a danger that the Commission has decided that a measure should be classified as an implementing act and the revised comitology process has been engaged it will be loath to admit that any changes made by this process involve supplementation of the legislative act via the introduction of “non-essential” elements since that would mean that the act should be regarded as a delegated act. See Craig and Búrca, *EU Law Text, Cases and Materials*, 118.

³²⁶ Annual Report 2012 on Relations between The European Commission and National Parliaments, COM(2011) 345 final, p. 4.

³²⁷ Bruno de Witte, 'The Role of Institutional Principles in the Judicial Development of the EU Legal Order' in Francis Snyder (ed), *The Europeanisation of Law: The legal effects of European integratio* (2000), 89.

questions as to whether the CJEU gives subsidiarity the nature of general principle of EU law. De Witte has raised doubts as to the classification of subsidiarity as a general principle of EU Law.³²⁸ He makes a distinction between EU general principles of EU law, that he defines as “unwritten principles, recognised by the European Court of Justice and its [General Court] which possess a higher law status by the fact that they may be invoked as standards for the review of [EU] acts.”³²⁹ As such, these principles are “an important instrument for the protection of the individuals, often business firms, against policies and administrative measures of the European [EU] and its Member States.”³³⁰ De Witte contrasts this category of general principles of EU law with another category of principles, the “general principles of institutional law”. The latter do not serve to protect the position of the individual, but to regulate the relations between institutions, both at horizontal level, i.e. between the institutions of the European Union, and at vertical level, i.e. between the institution of the EU and those of the Member States.³³¹ Subsidiarity, according to de Witte’s classification, would be a vertical principle of institutional law, as it serves to regulate the relation between the EU and the Member States. De Witte questions the capacity of the “general principles of institutional law” to be “general principles of EU law” on the basis that there are doubts regarding the invocability of the former by individuals, either before national courts or European courts. General principles of institutional law would then be an independent source of legal obligation but without adding any legal value to these norms.³³² Tridimas also makes a similar distinction between “systemic principles which underlie the constitutional

³²⁸ Ibid, 83-100; Gráinne de Búrca, 'Proportionality and Subsidiarity in General Principles of Law' in Ulf Bernitz and Joakim Nergelius (eds), *General Principles of EC Law* (Kluwer Academic Publishing 2000).

³²⁹ de Witte, 'The Role of Institutional Principles in the Judicial Development of the EU Legal Order', 83.

³³⁰ Ibid.

³³¹ Ibid.

³³² Ibid, 85.

structure of the Union,” such the subsidiarity principle³³³ and “principles which derive from the rule of law,” that refer to the relation between individuals with public bodies.³³⁴ However, contrary to de Witte, Tridimas considers both types to be general principles of EU Law. In the same sense, Tridimas does not attach any consequence to the fact that subsidiarity was not first established by the CJEU. He considers that in terms of its materialisation, a general principle may be expressly stated or deduced by a process of interpretation on the basis of legislative texts, the objectives of the legislation, or the underlying values of the legal system.³³⁵ Subsidiarity, as well as proportionality and fundamental rights, have been expressly stated in the Treaty as part of the formalization of European Law, of which the origin can be traced back to the Maastricht Treaty.³³⁶ According to Tridimas, all have the nature of general principles and any act of an European Institution can be challenged on the grounds of breach of a general principle that also serves as an aid to interpretation.³³⁷

To access the nature of subsidiarity as a general principle of EU law it is thus paramount to assess the issue of its justiciability. Is subsidiarity a principle against which any act from the EU institutions may be challenged? Does it also serve as an aid to interpretation of EU law? The issue of the justiciability of the subsidiarity principle, was discussed at length before the introduction of the principle in the Maastricht Treaty.³³⁸ At the time of the Maastricht Treaty’s negotiations, there was an opposite stance between politicians and lawyers on the

³³³ In this type of general principles of EU Law Tridimas includes primacy, attribution of competences, subsidiarity and the duty of cooperation provided for in Article 4 (2) TEU. Tridimas, *The General Principles of EU Law*.

³³⁴ In this type of general principles of EU Law Tridimas includes primacy, attribution of competences, subsidiarity and the duty of cooperation. Ibid

³³⁵ Ibid.

³³⁶ See Article 5 TEU.

³³⁷ Tridimas, *The General Principles of EU Law*, 29.

³³⁸ The experience with subsidiarity at the European level at that time was very limited. Also at national level, in Member States where subsidiary was at the time a well know constitutional concept, it did not meant that it was a judiciable principle. In Germany, for example the subsidiarity principle introduced in the German Basic Law in 1949 was only made justiciable with the Constitutional amendment in 1994 (1994 BGBl. I 3146).

question of its justiciability. On one side, the politicians and political bodies in the preparatory works of the draft Treaty of the European Union expressed a strong desire to subject the application of subsidiarity to judicial control.³³⁹ This was clear in the various reports of the Committee on Institutional Affairs, where the European Parliament considered that “judicial guarantees must be given with regard to respect of the principle of subsidiarity” and that “the Court of Justice should be given jurisdiction as a constitutional body, with the task of ensuring in particular that the division of competences between the European Union and the Member States is respected.”³⁴⁰ Also, the European Parliament stated in a Resolution on the principle of subsidiarity that “it is necessary to guarantee respect in law of the principle of subsidiarity by endowing the Court of Justice with the appropriate powers and allowing the EU Institutions and Member States to refer matters to it when they arise.”³⁴¹ This contrasts with the position of legal experts at the time, who were against incorporating the principle of subsidiarity into the EC Treaty other than in the preamble, as it would make it justiciable before the CJEU. For example, the House of Lords Selected Committee on the European Communities stated that it did “not believe that subsidiarity can be used as a precise measure against which to judge legislation. The test of subsidiarity can never be wholly objective or consistent over time - different people regard collective action as more effective than individual action in different circumstances. To leave legislation open to annulment of revision by the European Court on such subjective grounds would lead to immense confusion and uncertainty in Union law.”³⁴² The issue of justiciability of the

³³⁹ Akos G. Toth, 'Is subsidiary justiciable?' (1994) 19 European Law Review , 270.

³⁴⁰ Report of the Committee on Institutional Affairs for the Principle of Subsidiarity (Rapporteur Valéry Giscard D'Estaing), October 31, 1990, EP Session Documents A3-0267/90.

³⁴¹ Resolution of the European Parliament on the principle of subsidiarity [1990] OJ C 231/163, paragraphs 12, 14.

³⁴² Section 1989-90, 27th Report “Economic and Monetary Union and Political Union”, pt. 165. The Committee also affirmed that “We favour including the principle of subsidiarity only in the preamble of the new Treaty, so as to avoid litigation as to the validity of Council and Commission litigation. Subsidiarity is a political principle which should permeate all stages of the Community legislative process, but the responsibility of its application should like with the legislator and not with the judges.” Ibid, p. 122.

subsidiarity principle was given a positive answer by the introduction of the principle into the Maastricht Treaty, and has been reinforced since then.³⁴³ The CJEU has also repeatedly stated its jurisdiction to judge possible violations of the principle of subsidiarity.³⁴⁴

Conclusion

The distribution of power between the EU and the Member States is constitutionally guaranteed. The Treaty of Lisbon has introduced a system of competences setting the jurisdictional boundaries of the Union and of the Member States. Yet, multi-level power distribution remains one of the most testing issues in structures like the EU that require careful consideration of multiple factors.³⁴⁵ Under Article 3(1)(b) TFEU the Union has exclusive competence to establish the competition rules necessary for the functioning of the internal market. Yet, this chapter has shown that an isolated reading of this article reveals very little on the nature of the EU competence in the competition field and on the modalities for its exercise. It concludes that the existing debate in the literature on this matter does not provide a conclusive answer on how competence in the field of competition within the EU is allocated. This analysis will be pursued in chapters 3 and 4 that will explore the inner and the outer boundaries of Article 3(1)(b) TFEU, respectively.

³⁴³ Paragraph 13 of the Protocol on the application of the principles of subsidiarity and proportionality annexed to the EC Treaty according to which “Compliance with the principle of subsidiarity shall be reviewed in accordance with the rules laid down by the Treaty”. More recently, Protocol (No 2) annexed to the TEU and the TFEU in its Article 8 confirms the jurisdiction of the Court of Justice of the European Union in actions on grounds of infringement of the principle of subsidiarity by a legislative act according to the rules laid down in Article 263 TFEU.

³⁴⁴ Judgment of 12 July 2006, *Ayadi v Council*, T-253/02, EU:T:2006:200, paragraph 107.

³⁴⁵ Peter Lindseth, 'Delegation is Dead, Long Live Delegation: managing the democratic disconnect in the European market-polity' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (OUP 2002), 158.

Chapter 3 - The outer boundaries of Article 3(1)(b) TFEU – The conferral provision

The debate on the nature of the EU competence in the field of competition has not yet been closed. Chapter 2 showed that current literature does not provide a conclusive answer to this question and that further analysis is necessary. This analysis is carried out in this Chapter 3 and also in Chapter 4 that should be read jointly.

The aim of Chapters 3 and 4 is to assess whether and to what extent the door to diversity by the legislative action of the Member States and their enforcement of EU competition law remains open under the constitutional arrangements on competence allocation between the EU and the Member States in the field of competition enshrined in the European Treaties.

Contrary to other exclusive competences under Article 3(1) TFEU (e.g. customs union, monetary policy, common commercial policy), the EU exclusive competence under Article 3(1)(b) TFEU has been established in a more narrower fashion. It regards only to the “establishing of the competition rules necessary for the functioning of the internal market.”

The CJEU itself, when called upon to analyse the competence of the EU under Article 3(1)(b) TFEU, does not refer to the policy field of “competition”, but to the “area of competition rules necessary for the functioning of the internal market.”³⁴⁶ Section 1 of this chapter explores the limits to the EU competence in the field of competition that follow directly from the narrow formulation of Article 3(1)(b) TFEU. Section 2 discusses who has competence to establish competition rules that are not necessary for the functioning of the internal market. The outer boundaries of the exclusive competence to the EU under Article 3(1)(b) TFEU are further explored in section 3 that asks whether the executive competence to enforce EU

³⁴⁶ Joined Cases C-274 and 295/11 Spain and Italy V Council EU:C:2013:240, paragraph 24.

competition law is within the scope of such exclusive competence to the EU. Finally, Section 4, debates the nature of the EU executive competence to enforce EU competition law.

1. The exclusion of the competence to establish competition rules that are not necessary to the functioning of the internal market

Under Article 3(1)(b) TFEU only the adoption of rules that are “necessary for the functioning of the internal market” is within the scope of the exclusive competence of the EU.³⁴⁷ We have seen that this expression has been causing some controversy. Dashwood considers that this provision simply states the obvious as only the EU has competence to adopt rules applicable throughout the internal market.³⁴⁸ Schütze and Townley considered that the Treaty might have fallen victim to a “logical fallacy” and classified the competence of the EU as exclusive since only the EU can enact competition rules that are applicable throughout the internal market.³⁴⁹ As argued by Townley that was not good reason for the Treaty’s drafters to consider competition in the internal market as the exclusive competence of the EU. It is rather a shared competence under Article 4(2)(a) TFEU. Against these views I argue that, if we consider the role of Article 3 TFEU in the EU’s system of competence, the wording of Article 3(1)(b) TFEU is not “technically inept” and it is not a “logical fallacy.” Article 3 has a conferral role. It confers competence to the EU of an exclusive nature in the areas mentioned therein. Under the principle of conferral, the EU shall act not only within the limits of the competences that have been conferred upon it by the Treaties, but also to attain the objectives set out therein.³⁵⁰ The introduction of the expression “necessary for the functioning of the internal market” in Article 3(1)(b) TFEU has the important effect of

³⁴⁷ Lenaerts and others, *European Union Law*, 126.

³⁴⁸ Dashwood, 'The relationship between Member States and the European Union/European Community', 72.

³⁴⁹ Schütze, *European Constitutional Law* Townley, 'Constitutional limits to diversity (and Co-ordinated diversity) in EU competition law', 32.

³⁵⁰ Article 5(2) TEU.

establishing (i) the limits of the transfer of competence from the Member States to the EU as regards “the establishing of the competition rules” and (ii) the objectives of that competence.

The limits of the conferral of competence to “the establishing of the competition rules”

The confinement of the EU competence to enact competition rules by reference to the “functioning of the internal market” is of particular importance and reach. “Exclusive competences are those which have been definitively and irreversibly forfeited by the Member States by reason of their straightforward transfer to the Union.”³⁵¹ An exclusive competence of the EU excludes the Member States from acting within the same area, except if authorised by the EU to do it.³⁵² If the EU’s exclusive competence under Article 3(1)(b) TFEU to “the establishing of the competition rules” had not been limited to the situation where those rules are “necessary for the functioning of the internal market” there would have been an unlimited transfer of competence to the EU to adopt competition rules. Member States would have lost the competence to regulate competition in their national territories. There has been a previous situation where the Member States had conferred full and unlimited competition in competition matters. That was the situation in the context of the European Coal and Steel Community (ECSC) as regards the coal and steel industries under the Treaty of Paris.³⁵³ It was received wisdom, confirmed by the CJEU,³⁵⁴ that under the Treaty Constituting the European Coal and Steel Community (ECSC Treaty) the contracting parties had fully transferred competence to the ECSC in matters of competition regarding these industries. The basic provisions on competition in the Treaty of Paris left no room for

³⁵¹ Lenaerts and others, *European Union Law*, 125.

³⁵² Article 2(1) TFEU.

³⁵³ Treaty Establishing the European Coal and Steel Community, April 18, 1951, entered into force 23 July 1952, expired on 23 July 2002.

³⁵⁴ Judgment of 23 February 1961, *De gezamenlijke Steenkolenmijnen in Limburg v High Authority*, Case 30/59, EU:C:1961:2, paragraph 22; Opinion of Advocate General Roemer of 19 December 1968, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1968:55.

national competition laws to be enacted and applicable to the coal and steel industries. This has been eloquently argued by Verstrynge who compared the transfer of jurisdictional competence in competition matters under the Treaty of Rome, with that of the Treaty of Paris,³⁵⁵ signed by the same six signatories back in 1951.³⁵⁶ The ECSC Treaty included two articles on competition: Article 65, prohibiting anticompetitive agreements and Article 66, dealing with 'concentrations' and 'misuses' of economic power. The ECSC Treaty also established an institutional framework that included a Council, representing the participating Member States that would enact laws, a High Authority, that would be responsible for applying those laws to the coal and steel industries and a European Court with judicial functions to rule on disputes over the Treaty.³⁵⁷ The subsequent EEC Treaty did not modify the transfer of jurisdiction under ECSC Treaty.³⁵⁸ Verstrynge pointed out that it was generally recognized that there had been a complete transfer of jurisdiction from the Member States to the ECSC under the Treaty of Paris. The wording of the competition provision of the EEC Treaty, Articles 65(1), 66(1) and 66(7) ECSC Treaty, was clear in leaving no room for the application of national antitrust laws to practices regarding the coal and steel industry.

Under Article 65(1) ECSC Treaty:

All agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort

³⁵⁵ Treaty Establishing the European Coal and Steel Community, April 18, 1951, entered into force 23 July 1952, expired on 23 July 2002.

³⁵⁶ Jean-François Verstrynge, 'The relationship between National and Community Antitrust Law: an overview after the Perfume Cases' (1981) 3 Northwestern Journal of International Law & Business .

³⁵⁷ In 1965, the European Economic Community (EEC) Commission and Council have replaced the European Coal and Steel Community (ECSC) High Authority and Council, under the Treaty of Brussels, signed on the 8th of April 1965, but the six Members of the ECSC and EEC Treaties.

³⁵⁸ Article 232(1) Treaty Establishing the European Economic Community (EEC Treaty) stated that: *The provision of this Treaty shall not affect the provisions of the Treaty establishing the European Coal and Steel Community, in particular as regards the rights and obligations of Member States, the powers of the institutions of that Community and the rules laid down by the Treaty of the Functioning of the Common Market in coal and steel.*

normal competition within the Common Market shall be prohibited (...)(Emphasis added)

Under Article 66(1) ECSC Treaty:

Any transaction shall require the prior authorisation of the High Authority, subject to the provision of paragraph 3 of this Article, if it has in itself the direct or the indirect effect of bringing about within the territories referred in the first paragraph of Article 79 as a result of action by any person or undertaking or group of persons or undertakings a concentration between undertakings at least one of which is covered by Article 80, whether the transaction concerns a single product or a number of direct products..." (Emphasis added)

Article 66(7) ECSC Treaty provided that:

If the High Authority finds that public or private undertakings which, in law or in fact, hold or acquire in the market for one of the products within its jurisdiction a dominant position shielding them against effective competition in a substantial part of the Common Market are using that position for purposes contrary to the objectives of this Treaty, it shall make to them such recommendations as may be appropriate to prevent the position from being so used. (Emphasis added)

On these grounds Verstrynge argues that Member States had lost the power to enact and apply competition rules to coal and steel industries. It was also recognized that there had been an unlimited transfer of jurisdiction from the Member States to the EEC Commission that replaced the High Authority, to enforce Articles 65 and 66 ECSC Treaty.³⁵⁹ The Commission became the sole competent to apply antitrust rules in the context of the ECSC Treaty.³⁶⁰ This exclusive competence was also expressly recognised by the national laws in Germany³⁶¹ and the UK,³⁶² and in particular by the CJEU in 1961.³⁶³

[U]nder Article 1 of the [ECSC] Treaty the Community is founded upon a common market, common objectives and common institutions. In the Community field, namely in respect to everything that pertains to the pursuit of the common

³⁵⁹ Verstrynge, 'The relationship between National and Community Antitrust Law: an overview after the Perfume Cases', 361.

³⁶⁰ European Communities Commission, Second Report on Competition Policy 32 n.27 (1973) and European Communities Commission, Sixth Report on Competition Policy 64 n. 113 (1977).

³⁶¹ Article 101 Gesetz gegen Wettbewerbsbeschränkungen.

³⁶² Restrictive Practices Act 1976., Ss. 9(1) and 34.

³⁶³ Judgment of 23 February 1961, *De gezamenlijke Steenkolenmijnen in Limburg v ECSC High Authority*.

*objectives within the common market, the institutions of the Community have been endowed with exclusive authority.*³⁶⁴

In contrast to the ECSC Treaty, the competition provisions of the EEC Treaty were limited to practices that “affect trade between Member States.” Article 85 EEC Treaty (now Article 101 TFEU) prohibited

all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States (...).

Article 86 (now Article 102 TFEU) prohibited

“[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it (...) in so far as it may affect trade between Member States.”

Spaak and Jaeger pointed out that it would have not been possible to grant the EEC such wide powers over the whole economy of the six Member States while leaving to the Governments of those States with the political responsibility involved.³⁶⁵ These authors considered that the EEC Treaty had a different logic from the ECSC Treaty. The ECSC Treaty established a community for two basic industries only: the coal and steel industries. In its efforts to allow a common basis for industrial expansion and further economic integration, the ECSC Treaty established a “pool” of coal and steel production. It is this pooling of production that explains why the ECSC Treaty gave the High Authority definite power over the matters it covers. The EEC Treaty established a community comprising all other sectors of the economy. On these grounds, Spaak and Jaeger argued that “this notion of ‘pool’ of production could no longer apply when it came to the entire economy of the six countries.

³⁶⁴ Judgment of 23 February 1961, *De gezamenlijke Steenkolenmijnen in Limburg v ECSC High Authority*, at 22.

³⁶⁵ Fernand Spaak and Jean N. Jaeger, 'The Rules of Competition Within the European Common Market' (1961) 3 *Law and Contemporary Problems*, 488.

It is no longer a question of ‘partial integration, limited to basic industries.’”³⁶⁶ Also, they argued that the geographical location of the coal and steel industry, where the great majority of the enterprises were located with a triangle formed by the Ruhr, Lorraine, Northern France and Belgium, practically any action restricting competition would directly or indirectly affect trade between Member States.³⁶⁷ These differences may justify that under EEC Treaty the Governments have retained the power to regulate competition under their respective territory.³⁶⁸ At the time of the entry into force of the Treaty of Rome, some Member States already had national competition laws,³⁶⁹ and others enacted them later. The question on the relation between the national laws and the competition provisions in the EEC Treaty was soon raised. Did Member States retain competence to regulate competition in their territories?³⁷⁰ In *Walt Wilhelm v. Bundeskartellamt*,³⁷¹ the CJEU recognised that Member States have retained competence to enact and apply national competition laws. As stated by the Advocate General in the case, there was nothing in the provisions of the EEC Treaty to indicate that “there exists a legal situation analogous to that in force in the ECSC where, it is well known, agreements concluded by coal and steel undertakings could only be examined under Article 65 of the ECSC Treaty.”³⁷²

The limited scope of powers conferred to the EU on competition under the Treaty of Rome could have been changed if the Treaty of Lisbon had not limited the exclusive competence

³⁶⁶ Ibid.

³⁶⁷ Ibid, 489.

³⁶⁸ Independently of the coordination in regard to the application of the rules of competition of the Treaty, Spaak and Jaeger considered that harmonization of the national laws may be arrived under Article 100 EEC Treaty, should this prove necessary to the establishment or functioning of the Common Market, see *ibid*.

³⁶⁹ Belgium, France and The Netherlands.

³⁷⁰ The Italian law was the only national competition law addressing this issue directly, stating that it was only applicable where the Treaty’s provisions were not applicable. Art. 1 (1) Legge 10 ottobre 1990, n. 287, GURI n. 240 del 13 ottobre 1990.

³⁷¹ Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4

³⁷² Opinion of Advocate General Roemer of 19 December 1968, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1968:55.

of the EU under Article 3(1)(b) TFEU to establishing of the competition rules that are necessary “for the functioning of the internal market.”

As previously submitted, the difference between the different types of EU competences is of a relational kind: exclusive competence excludes other authorities from acting within the same policy area.³⁷³ If Article 3(1)(b) TFEU had not restricted the exclusive competence of the EU to enact competition rules to those that are necessary for the functioning of the internal market, then Member States would have transferred to the EU unlimited competence to enact competition laws to be applicable to situations affecting their territory. They did not. Articles 101 and 102 TFEU have remained applicable to situations that affect trade between Member States only, as the exclusive competence of the EU under Article 3(1)(b) TFEU only confers power to the EU in order to enact rules “that are necessary for the functioning of the internal market.”

The EU only has the powers that have been conferred to it. The competence not conferred on the EU remains within the residual competence of the Member States.³⁷⁴ Taking this into consideration, Article 3(1)(b) TFEU can neither be considered “technically inept” nor a “logical fallacy.” It serves the constitutional purpose of limiting the transfer of competence to the EU to establish the competition rules. The competence to establish competition rules that are not necessary for the functioning of the internal market has remained in the Member States.

The objective of “the establishing of the competition rules”

The reference in Article 3(1)(b) TFEU to the “functioning of the internal market” also serves the purpose of clarifying the objectives of the EU competence conferred thereby. The EU acts within the powers it has been conferred and it uses those to attain the objectives set

³⁷³ Schütze, *European Constitutional Law*, 163.

³⁷⁴ Article 4(1) TEU.

out by the Treaties.³⁷⁵ The clarification that competition rules must be necessary for the functioning of the internal market is of particular importance if we recall the context of the negotiations of the Treaty of Lisbon as regards the field of competition. The Treaty of Lisbon “marked the first time in the chronicle of European integration that competition law’s role in the structure of the Treaties has been questioned.”³⁷⁶ Article 3(1)(g) of the EC Treaty provided that for the purpose of accomplishment of its tasks the activities of the Community shall include “a system ensuring that competition in the internal market is not distorted.” In *Continental Can* the Court recognized that the objectives pursued by Article 3(1)(g) EC Treaty were “indispensable” for the achievement of the Community’s tasks. The Draft Constitutional Treaty established under Article I(3)(2) that “[t]he Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted.”³⁷⁷ However, this did not make it into the Treaty of Lisbon that merged the former Articles 2 and 3 EC Treaty into the new Article 3 TEU. The merger resulted in broader economic and non-economic objectives and tasks of the EU. Under Article 3(3) TEU:

“The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.”

³⁷⁵ Article 5(2) TEU.

³⁷⁶ Lianos, 'Competition law in the European Union after the Treaty of Lisbon', 255.

³⁷⁷ Lianos points out that jurisprudence of the Court at the time interpreted the freedoms of movement (free movement of goods, services, persons and capital) as equivalent to fundamental rights at the core of the European constitutional project. Therefore, this linked competition law to the goal of market integration, raising the rank of competition law to that of the fundamental freedoms of movement. Ibid See Judgment of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333; Judgment of 14 October 2004, *Omega*, C-36/02, EU:C:2004:614; Judgment of 18 December 2007, *Laval un Partneri*, C-341/05, EU:C:2007:809; Judgment of 11 December 2007, *The International Transport Workers' Federation and The Finnish Seamen's Union*, C-438/05, EU:C:2007:772 and Judgment of 3 April 2008, *Rüffert*, C-346/06, EU:C:2008:189.

There is no reference to the principle of “undistorted competition” and “free competition”,³⁷⁸ and the concept of “social market economy” replaces the expression “open market economy with free competition.” The reference to the internal market in Article 3(1)(b) TFEU, jointly with Protocol (No 27) on the internal market and competition, brings competition rules into the internal market again. Once more, Article 3(1)(b) TFEU cannot be considered “technically inept.” It expresses the objectives of EU action under the exclusive competence conferred by that provision. Jointly with Protocol (No 27), this is of great relevance, as pointed out by Petite, “to avoid any risk of uncertainty as to settled law and to make fully clear that competition will continue to be one of the main policies aiming at the good functioning on the internal market(...).”³⁷⁹ Some authors, such as Lianos also see in this formulation the possibility for the EU to adopt a more “holistic” approach to competition, particularly to attain other objectives and public policies that might be frustrated by the application of competition law.³⁸⁰ This is particularly relevant if we take into consideration the discussion in Chapter 1 on the plurality of goals of the Treaties and consider that, as argued by Townley, the Treaty of Lisbon did not change the “force of teleological arguments for public policy balancing in EU competition law.”³⁸¹

2. The nature of the competence to establish the competition rules that are not necessary for the functioning of the internal market

The competence to establish competition rules that are not necessary for the functioning of the internal market is not within the exclusive competence of the EU under Article 3(1)(b)

³⁷⁸ Protocol (No 27) on the internal market and competition annexed to the TEU and TFEU explicitly mentions that “the internal market as set out in Article 3 TEU includes a system ensuring that competition is not distorted.

³⁷⁹ Michel Petite, 'EU commitment to competition policy is unchanged' *Financial Times* (27 June) <http://www.ft.com/cms/s/0/72f53bd8-244a-11dc-8ee2-000b5df10621.html?desktop=true&ft_site=falcon&siteedition=intl#axzz4sG5U4KX8>

³⁸⁰ In this sense see Lianos, 'Competition law in the European Union after the Treaty of Lisbon', 260.

³⁸¹ Townley, 'Constitutional limits to diversity (and Co-ordinated diversity) in EU competition law', 36.

TFEU. What is then the nature of this competence? We have seen in the previous chapter that, under the system of competences established by the Treaty of Lisbon, if a legal basis conferring powers to the EU to act outside the scope of an exclusive competence is found in the Treaties, that competence is shared under Article 4(1) TFEU. If there is no legal basis in the Treaties allowing the EU to act, it means that such competence has remained with the Member States as per Article 4 (1) TEU.

There are no provisions in the Treaties that allow the EU to adopt competition rules that are not necessary for the functioning of the internal market. Even the general competences that the EU enjoy under Articles 114 and 352 TFEU are limited to the creation or functioning of the internal market.

Therefore, the competence to establish competition rules that are not necessary for the functioning of the internal market has remained with the Member States, that have an exclusive competence in this area.

3. Exclusion of the competence to enforce EU competition law

Article 3(1)(b) TFEU limits the exclusive competence of the EU to “the establishing of the competition rules.” It is submitted that the enforcement of EU competition rules is excluded from the scope of the exclusive competence under Article 3(1) TFEU. This is because a decision to enforce EU competition provision cannot be considered to be within the notion of “rules.”

The notion of “rule”

What is a “rule” and what can be considered the action of “the establishing of the competition rules”? Those are relevant questions for the purpose of understanding the scope of the competences under Article 3(1)(b) TFEU.

The concept of “rule” has been the object of intense discussion in legal theory. From Hart’s positivism³⁸² to Dworkin’s concept of rules,³⁸³ and Kelsen’s pure theory of law that argues that all public decision-making involves a normative dimension,³⁸⁴ the notion of “rules” has been contentious. It is not the object of this thesis to get into this discussion. The notion of “rule” for the purpose of Article 3(1)(b) TFEU needs to be ascertained from the logic of the Treaties. What is a “rule” is not directly defined in the Treaties. However, it can be inferred from the wording of Article 3(1)(b) TFEU directly that the concept of “rules” therein means acts of a legislative nature, as opposed to acts of an executive nature. To consider otherwise would be a violation of the principle of the separation of powers. Competence under Article 3(1)(b) TFEU specifically concerns “the establishing of the competition rules.” Ever since the publication of Montesquieu’s “The spirits of laws,” in 1748 the separation of powers has constituted a structural guarantee of democracy conditioning the exercise of public authority. This is also true as regards the EU legal order.³⁸⁵ Montesquieu identified three governmental powers, known as legislative, executive and judicial powers.³⁸⁶

³⁸² H.L.A. Hart, *The concept of law* (2nd edn, Oxford University Press 1994).

³⁸³ Ronald M. Dworkin, *Taking rights seriously* (Harvard University Press 1986).

³⁸⁴ Hans Kelsen, *General theory of law and state* (Harvard University Press 1949).

³⁸⁵ For a general overview of the principle of separation of powers in the EU see Koen Lenaerts, *Le juge et la Constitution aux États-Unis d'Amérique et dans l'ordre juridique européen* (Bruylant 1988), Chapter 3; Koen Lenaerts, 'Some reflections on the separation of powers in the European Community' (1991) 28 *Common Market Law Review* Robert Schütze, *Sharpening the separation of powers through a hierarchy of norms? Reflections on the draft constitution Treaty's regime for legislative and executive law-making* (Working Paper 2005/W-01, EIPA 2005); Schütze, *European Constitutional Law*, 83-85.

³⁸⁶ Montesquieu presents the main idea of separation of powers as follows:

In every government there are three sorts of power: the legislative, the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law. [...] When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judicial power be not separate from the legislative and the executive. Were it joined to the executive power, the judge might behave with violence and oppression.

Charles de Secondat Baron de La Brède et de Montesquieu, The Spirit of Laws Book XI, Chapter 6 (1748) Accessed last time 10 September 2017.

Traditionally there are two understandings of the principle of separation of powers: “organic” and “functional”.³⁸⁷ The organic understanding of separation of powers results from a distinction between the organs that have the legislative, executive and judicial functions. The American constitution is typically given as an example of a constitution that embraces an organic understanding of separation of powers.³⁸⁸ The first three Articles of the constitution designate the organs in which the legislative, the executive and the judicial power are vested (the Congress, the President and the Supreme Court). Lenaerts argues that in the EU context, an organic approach is not possible. There is no clear identification under the Treaties of which EU institutions hold the several powers. This is because a closer analysis of their prerogatives under the Treaties³⁸⁹ does not indicate a clear cut line between the legislative and the executive branches of the EU government.³⁹⁰ Lenaerts claims that in the EU context the understanding of separation of powers is functional:

*[T]he legislative power relates to the function of enacting rules with a general and abstractly defined scope of application (this is what a Continental European lawyer would call the “lois matérielles”); the executive power relates to the function of applying the said legislative rules to individual cases or specific categories of cases; finally the judicial power relates to the function of settling the meaning legislation that arises on the occasion of the application of the legislative rules to individual cases or specific category of cases, and this on several possible grounds[.]*³⁹¹

Having this into consideration, the distinction between legislative and executive powers is of particular relevance to understanding what “rules” under Article 3(1)(b) TFEU may include.³⁹²

³⁸⁷ Lenaerts, 'Some reflections on the separation of powers in the European Community', 12.

³⁸⁸ Lenaerts, *Le juge et la Constitution aux États-Unis d'Amérique et dans l'ordre juridique européen* Schütze, *European Constitutional Law*, 83.

³⁸⁹ Schütze identifies the following correlation of the EU institutions to governmental functions: Legislative: Parliament and Council; Executive: European Council and Commission; Judicial: Court and Commission. Schütze, *European Constitutional Law*, 86.

³⁹⁰ Lenaerts, 'Some reflections on the separation of powers in the European Community', 12.

³⁹¹ *Ibid*, 12.

³⁹² This is true, even for legal philosophy scholars that embrace a large notion of “law” based on a functional conception of legislation. The Vienna School of Pure Law to which Kelsen is intrinsically associated to, claimed that all public decision-making involved a normative dimension and that therefore, the legislative function was not limited to the legislature, but was also exercised by the executive and judicial bodies. In Kelsen words:

According to the EU functional understanding of separation of powers, “the establishing of the competition rules” corresponds to the exercise of legislative power. Therefore, “rules” within that provision constitutes acts of a legislative nature. Acts of an executive nature are excluded from the scope of the exclusive competence of the EU under Article 3(1)(b) TFEU, as it relates to the function of applying such law to individual or specific cases.

The EU executive powers do not match the EU legislative powers

The exclusion of the executive power from an area of exclusive competence of the EU under Article 3 TFEU is not specific to the field of competition. I argue that, under the Treaties, the EU exclusive legislative powers do not necessarily match the EU’s exclusive executive powers. This can be illustrated, by the competence of the EU in the area of common commercial policy (CCP). CCP is included in the catalogue of exclusive competences of the EU. Article 3(1)(e) TFEU makes a simple reference to the whole area of “common commercial policy”, not circumscribing the EU powers in that area. It could thus be argued that the exclusive competence of the EU under that provision covers both executive and legislative competence. However, the legal bases for the acts of the EU in the area of CCP are found in Article 207 TFEU. This provision only allows the EU to adopt general measures of two types: international agreements (paragraph 1)³⁹³ and regulations (paragraph 2).³⁹⁴ Therefore, the EU’s executive competence to adopt individual decisions to enforce CCP law must be found

“The legislative function is opposed to both the executive and the judicial functions, (...). Legislation (*legislatio* of Roman law) is the creation of laws (*leges*). If we speak of “execution” we must ask what is executed. There is no other answer but the statement that it is the general norms, the constitution and the laws created by the legislative powers, which are executed.” Kelsen, *General theory of law and state*, 255.

³⁹³ Article 202 (1) TFEU “The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariffs rates, the conclusion of tariffs and trade agreements relating to trade in goods and services and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of principles and objectives of the Union’s external action.

³⁹⁴ Article 202 (2) TFEU “The European Parliament and the Council, acting by means of regulation in accordance with the ordinary legislative procedures, shall adopt the measures defining the framework for implementing the common commercial policy.”

elsewhere in the Treaty. While Article 290 TFEU can be the basis for the competence of the Commission to implement the CCP through acts of general application, the basis for the adoption of individual decisions must be founded in a general competence of the EU to execute EU law, which is Article 291 TFEU. This provision only grants a shared competence to the EU.³⁹⁵ In fact, Article 291(1) TFEU makes it clear that the implementation “is first and foremost the task of the Member States.”³⁹⁶ This is a corollary of the Member States’ duty of “sincere cooperation.” Under Article 4(3) TEU, Member-States must ensure that they fulfil their obligations resulting from actions of the EU’s institutions. According to Article 291(2) TFEU:

“[w]here uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing power on the Commission, or in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.”

Therefore, the primary competence to enforce EU law pertains to the Member States, that implement EU law through its legislative transposition into national law and, indirectly, through its own administrative structure.³⁹⁷ Under the principle of procedural autonomy, where no relevant EU rules exist, national law determines the conditions for the enforcement of EU law. Moreover, Member States have autonomy as to their internal organization, so long as EU law does not require otherwise for example, providing for certain administrative procedures or specific organisation of authorities.³⁹⁸ Under Article 291(2) TFEU, only where uniform conditions for implementing legally binding EU acts are needed, those acts shall confer implementing power on the Commission. The powers of the EU to

³⁹⁵ In this sense see Schütze, 'From Rome to Lisbon: Executive federalism in the (new) European Union', 1401.

³⁹⁶ Hofman, Rowe and Türk, *Administrative Law and Policy of the European Union*, 237.

³⁹⁷ Ibid, 99.

³⁹⁸ Judgment of 15 December 1971, *International Fruit Company v Produktschap voor Groenten en fruit*, Joined Cases 51-54/71, EU:C:1971:128.

adopt individual decisions to implement the CCP are not exclusive. Those powers are subsidiary to the powers of the Member States.

The exclusion of acts of executive nature from the exclusive competence of the EU under Article 3(1)(b) TFEU is of particular relevance in the field of competition. Since the Treaty of Rome, the EU has been given powers under Article 105 TFEU to apply the principles laid down in Articles 101 and 102 TFEU.³⁹⁹ What is then the nature of the executive competence of the EU under Article 105 TFEU?

4. The nature of the EU executive powers under Article 105 TFEU

It is submitted that the EU's executive competence under Article 105 TFEU is shared, as per Article 4(1) TFEU. Under this provision, unless stated otherwise in the Treaties, where the Treaties confer on the EU a competence that competence is shared.

Against the shared nature of the EU competence to enforce EU competition provisions, Townley argues that, after the Treaty of Lisbon it has become clear that the enforcement of EU competition law is an exclusive competence of the EU.⁴⁰⁰ He mentions Article 3 TFEU as a legal basis for his conclusion.⁴⁰¹ He also claims that in *Akzo*,⁴⁰² the "CJEU accepted that competition is now an area of exclusive Union competence."⁴⁰³ I do not agree with this view. It has been showed that *Akzo* does not relate to the EU's power to enforce competition law.

³⁹⁹ The Treaty of Rome only conferred executive power to the Community – the power to adopt individual decisions – in three areas: agriculture (Article 43 EEC Treaty), transport (Article 79 and 80 EEC Treaty) and competition (Articles 85 e seq. EEC Treaty).

⁴⁰⁰ Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)', 208.

⁴⁰¹ Ibid, 227.

⁴⁰² Judgment of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, C-550/07 P, EU:C:2010:512.

⁴⁰³ Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)', 227.

Akzo is confined to the scope of the EU's powers to adopt rules of proceedings that will be applicable to its investigations under Article 105 TFEU. Townley's reading of *Akzo* is too broad, as the nature of the EU's competence to enforce EU competition law under Article 105 TFEU was not at stake in that case.

As to Article 3(1)(b) TFEU, this provision alone cannot be the basis for an exclusive executive competence of the EU to enforce EU competition provisions. As submitted above, this provision excludes executive acts from its scope. Therefore, Article 3(1)(b) TFEU alone does not determine the exclusive competence of the EU to enforce EU competition provisions.

There is, however, a possible reasoning that ought to be considered as, if not set aside, it could transfer to the EU executive competence to enforce EU competition provisions to the exclusive competence of the EU under Article 3(1)(b) TFEU. Such argument could be framed as follows: under Article 2(1) TFEU "when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts." Article 3(1)(b) TFEU confers exclusive competence to the EU in the area of competition. A decision enforcing EU competition provision in specific cases is a "legally binding act," as under the fourth paragraph of Article 288 TFEU "[a] decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them." Therefore, it could be argued that, as per Article 3(1)(b) TFEU read together with Article 2(1) TFEU, the adoption of individual decisions enforcing EU competition provisions would be within the scope of the exclusive competence of the EU.

This argument however also does not stand. Such an interpretation of the Treaty would not only be against the principle of the separation of powers as previously submitted, it would also be against the principle of conferral, as established by Article 5(2) TEU. To argue that the competence of the EU under Article 105 TFEU to enforce the Treaty's competition provisions is exclusive to the EU under Article 3(1)(b) by virtue of Article 2(1) TFEU is to

unduly extend the scope of the exclusive competence conferred on the EU by the Treaties. That is a violation of the principle of conferral. For conferral to be respected, Article 2(1) TFEU must be understood within the limits of the exclusive competence as conferred upon the EU under Article 3. Otherwise, this would amount to transform competences that were conferred as shared into exclusive ones. This is particularly well illustrated by the CCP area discussed above. We have seen that though specifically mentioned as an area of exclusive competence of the EU under Article 3(1)(e) TFEU, the legal basis to enact executive acts of individual application is Article 291 TFEU. This Article establishes a shared competence. However, if we considered that the competence to adopt any legally binding act in the CCP area is exclusive to the EU under Article 3(1)(e) TFEU as per Article 2(1) TFEU, EU competence under Article 291 TFEU in the field of CCP would be exclusive. This conclusion is not compatible with the principle of conferral as it means transforming a shared competence under Article 291 TFEU into an exclusive one. This makes no sense. Article 2(1) TFEU must therefore be understood within the scope of the exclusive competence under Article 3 TFEU.

Schütze⁴⁰⁴ also considers that the EU's exclusive competence under Article 3(1)(b) TFEU is partial and does not affect the competence of the Member States to implement EU competition law. Schütze seems to draw his conclusion, not from the scope of Article 3(1)(b) TFEU, but mostly from the decentralized system of enforcement of EU competition law under Regulation 1/2003. Schütze mentions that Regulation 1/2003 ultimately introduced a "revolutionary new administrative regime"⁴⁰⁵ for the enforcement of European competition law. Under the previous regime established by Council Regulation (EEC) 17/62 First Regulation implementing Articles 85 and 86 of the Treaty (Regulation 17/62) Articles 101 and 102 TFEU needed to be applied in an "uniform way by the Member States."⁴⁰⁶ To achieve

⁴⁰⁴ Schütze, 'From Rome to Lisbon: Executive federalism in the (new) European Union'.

⁴⁰⁵ Ibid, 1404.

⁴⁰⁶ Council Regulation (EEC) 17/62 First Regulation implementing Articles 85 and 86 of the Treaty, [1962] OJ 13/204, Recital 1.

this result, it required undertakings that sought application of Article 101(3) TFEU to notify their agreements to the Commission. The Commission was granted the “sole power to declare Article [101(1)] inapplicable pursuant to Article [101(3)] of the Treaty.”⁴⁰⁷ Member States could continue to apply Articles 101(1) and 102 TFEU.⁴⁰⁸ This system changed with Regulation 1/2003 that introduced a system of shared executive competences.⁴⁰⁹ Schütze argues that even if the “pre-eminence” of the Commission is established in Article 11(6) of the Regulation, under the new system⁴¹⁰ both the Commission and the national competition authorities can enforce EU competition law.⁴¹¹ However, this reasoning does not stand. Competence allocation is established by primary law.⁴¹² Secondary law cannot change the nature of the competence as established in the Treaties.

Schütze’s reasoning however can lead to a different type of question on the nature of the competence under Article 105 TFEU. The question is whether, irrespective of the limited scope of Article 3(1)(b) TFEU, the competence under Article 105 TFEU could be exclusive as per Article 105 TFEU directly, i.e. whether an exclusive competence could be conferred on the EU by Article 105 TFEU.

I argue it could not as, again, that would be contrary to the principle of conferral. If a legal basis for EU action is found in the Treaties, if not specifically identified as exclusive under Article 3 TFEU that competence is shared as per Article 4(1) TFEU. Executive action is excluded from the scope of Article 3(1)(b) TFEU, therefore is not within the scope of that competence. A legal basis for executive action can however be found in the Treaties: Article 105 TFEU. Such competence is shared as per Article 4(1) TFEU. However, for sake of

⁴⁰⁷ Ibid.

⁴⁰⁸ Article 9 Regulation 17/62.

⁴⁰⁹ Schütze, 'From Rome to Lisbon: Executive federalism in the (new) European Union', 1404.

⁴¹⁰ Article 5 Regulation 1/2003.

⁴¹¹ Schütze, 'From Rome to Lisbon: Executive federalism in the (new) European Union', 1404.

⁴¹² Article 5 TEU and Article 4(1) TFEU.

completeness, let us consider further the argument on whether Article 105 TFEU establishes an exclusive competence of the EU.

The Commission has been granted with exclusive powers to enforce competition law under specific conditions first set in Regulation 17/62 and now in Regulation 1/2003. Regulation 17/62 provided for a centralised notification and authorisation system by the Commission for the enforcement of Article 101(3) TFEU. Under Article 4(1) of the Regulation, agreements falling under Article 101(3) TFEU in respect of which the parties sought application of Article 101(3) TFEU had to be notified to the Commission.⁴¹³ Regulation 1/2003 replaced this system with a system of direct effect of Article 101(3). Article 1(2) of this regulation establishes that “agreement, decisions and concerted practices caught by Article [101](1) of the Treaty which satisfy the conditions of Article [101](3) of the Treaty shall not be prohibited, no prior decision to that effect being required.” The centralised system of notification and authorisation was thus abolished. Regulation 1/2003 however, gives the Commission the possibility to “relieve the competition authorities of the Member States of their competence to apply Articles [101] and [102] of the Treaty,” by initiating enforcement proceedings.⁴¹⁴ Regulations 17 and 1/2003 were adopted under Article 103 TFEU that, as seen above, delegates to the Council, acting on a proposal from the Commission and after consulting the European Parliament, the competence to lay down the “appropriate regulations and directives to give effect to the principles set out in Articles [101] and [102].”

In this context, if the competence of the EU under Article 105 TFEU was shared could the directives and regulations adopted under Article 103 TFEU curtail or suppress Member States’ competence in favour of the Commission? Or has the competence under Article 105 TFEU always been exclusive? I argue that competence under Article 105 TFEU has always been

⁴¹³ Under Article 6(1) of Regulation 17/62 the exemption decisions pursuant to Article 101(3) TFEU could not take effect at a date earlier than the date of notification. The condition of prior notification did not apply to the agreements falling within Article 4(2) of Regulation 17/62.

⁴¹⁴ Article 11(6) Regulation 1/2003.

shared and it has remained shared after the Treaty of Lisbon. Even if it was exclusive, it would be difficult to consider that it had remained exclusive under the Treaty of Lisbon.

As to the issue on whether the Member States competence could be suppressed by acts adopted under Article 103 TFEU if the EU competence under 105 TFEU was shared, I argue that it could. This issue concerns the possibility of delegation of shared executive powers to the Commission. I will first analyse this issue in general, and then in relation to the executive powers in competition law in particular. The sub-delegation of shared executive powers to the Commission is a possibility expressly recognised since the Treaty of Lisbon. As seen above, Article 291 TFEU attributes shared implementing powers to the EU. Article 291(1) TFEU determines that the implementation of EU law is primarily the task of the Member States. Article 291(2) TFEU however expressly determines that all types of binding EU acts shall delegate implementing powers to the Commission where uniform conditions for the implementation of those acts are needed.⁴¹⁵ Moreover, not only can the delegated powers be conferred by legislative acts under Article 289 TFEU, subject to the application of Article 290 TFEU, but also by delegated acts under Article 290 TFEU. This means that the Commission can confer implementing powers on itself “in an act of sub-delegation of powers.”⁴¹⁶

The implementation by the EU of EU competition law has an autonomous legal basis from the general provision of Article 291 TFEU, that is established by Articles 103 and 105 TFEU. Article 103(1) TFEU expressly establishes that the Council shall lay down the regulation or directives to give effect to the principles set out in Articles 101 and 102 TFEU. Under the general rule of Article 291 TFEU, delegation is only possible where “uniform conditions for implementing legally binding Union acts are needed.” Article 103 TFEU does not circumscribe

⁴¹⁵ In duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, Implementing powers should be delegated on the Council.

⁴¹⁶ Hofman, Rowe and Türk, *Administrative Law and Policy of the European Union*, 239.

the delegation to those specific circumstances. It mandates the Council to establish the appropriate rules to give effect to Articles 101 and 102 TFEU. However, as to any other implementing act, general principles of proportionality and subsidiarity must be met. Recital 34 of Regulation 1/2003 addresses those principles directly.⁴¹⁷ The possibility of sub-delegation in some competition matters also seems to be possible. Under Article 105(3) TFEU “the Commission may adopt regulations relating to the categories of agreements in respect of which the Council has adopted a regulation or directive pursuant to Article 103(2)(b).” As the case of the sub-delegation under Article 291 TFEU, the Commission’s implementing acts under Article 105(3) TFEU may well sub-delegate competences to the Commission in regard to the type of agreements mentioned therein.

Furthermore, it ought to be mentioned that the preparatory works of the Treaty of Rome regarding Article 103 TFEU show that the powers established therein were to regulate the exercise of shared competences.⁴¹⁸ The proposal submitted by the *Group de rédaction* to the

⁴¹⁷ Whereas 34 “The principles laid down in Articles 81 and 82 of the Treaty, as they have been applied by Regulation 17/62, have given a central role to the Community bodies. This central role should be retained, whilst associating the Member States more closely with the application of the Community competition rules. In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve its objective, which is to allow the Community competition rules to be applied effectively.”

⁴¹⁸ Due to the fact that intergovernmental negotiations are traditionally not concluded on documents available to the public, the CJEU tends to consider that the possibility to use them to interpret the Treaty is only available in very limited circumstances. For example, in the judgment of 12 April 2005, *Commission v United Kingdom*, C-61/03, EU:C:2005:210, paragraph 29 the Court considered that the evidence on interpretation to be taken into consideration could not be limited to the historical background to the drawing of the Treaty as they were inconclusive. The issue at stake was the application of a provision of the Treaty establishing the European Atomic Energy Community (EAEC Treaty) (Article 30) requiring Member States to provide to the Commission information on atomic waste to military installations. The UK, which was dismantling a nuclear reactor used for military purposes, argued that it has no obligation under the EAEC Treaty to provide the Commission with data regarding the decommissioning of the reactor (paragraph 16). The UK argued that the Treaty itself only covered civil uses of nuclear energy and a provision of the chapter of the Treaty on health and safety could not have a wider scope than that of the provision of other chapters of the same Treaty (paragraph 23). The Court considered that in absence of an express provision excluding activities connected to defence from the scope of the Treaty, it was necessary to have regard to other factors in order to determine whether the Treaty is intended also to govern, at least in certain spheres, the use of nuclear energy for military purposes (paragraph 28). The Court considered that it could not limit itself to take into consideration as evidence the historical background of the Treaty, as the unilateral declarations made by the representatives of certain States who took part on the negotiations leading to the signature of the Treaty were not conclusive. It was apparent that those

first reading foresaw that the task to establish the rules necessary for the enforcement of the competition law by the Member States should be the task of the European Community. The majority of the delegations rejected this view, claiming that that should be left to national laws and National Parliaments. France, joined by Germany, responded that the harmonisation of national regulation should be left to the National Parliaments. Belgium and Italy agreed with France and Germany, but mentioned that a deadline should be established for the National Parliaments to harmonise the laws. If the deadline was not met, the harmonisation should be done by the institutions of the European Community. Only the Netherlands considered that the harmonisation of national laws should be of the “immediate competence” of the Community’s institutions, but it then joined the position of Belgium and Italy. Eventually, the EU was given the task to establish the rules to enforce EU competition law; in the final version of Article 103 TFEU (then Article 87 EC Treaty). However, the shared nature of the powers to enforce EU competition law had never been in issue. This is clear in the proposal of the first regulation on the implementation of the rules on competition laid down in the Treaty, under then Article 87 EC Treaty (now Article 103 TFEU). The proposal was presented by the President of the Commission, Mr. Walter Hallstein, to the President of the Council, on the 31 October 1960. In the “*exposé de motifs*” it was expressly stated that the Commission and the Member States shared competences in this area: “[s]ince 1958, these aims had inspired the joint action of the Commission and the national competition authorities that shared the competence in this area.” The Commission also stressed that coordination between the Commission and the Member States for the enforcement of Articles [101] and [102 TFEU] was necessary in order to achieve a *communauté de conception*, which is a condition of a uniform policy. This points to the exercise of a shared competence under Article 105 TFEU. In the light of the above, it can be concluded that the

representatives had different views on the issue and that they have decided to leave it unsolved. Therefore, the Court concluded from this that the guidance provided from that evidence was not sufficient (paragraph 29).

de facto exclusive competence of the Commission under Article 4 of Regulation 17/62 and under Article 11(6) of Regulation 1/2003 is not the expression of an exclusive competence conferred to the EU by the Treaties. It is rather the result of a delegation to the Commission of shared executive powers under those Regulations. As I will show next, this conclusion is coherent with the CJEU case law on case allocation in competition enforcement actions and with the CJEU case law on the exercise of EU exclusive competence by the Member States.

The CJEU approach to case allocation in EU competition law enforcement

The EU Courts have been called to analyse the compatibility of the allocation of EU competition enforcement cases between the EU and the Member States under the subsidiarity principle on several occasions. Under Article 5(3) TEU, the subsidiarity principle is applicable to shared competences. In none of the cases have the EU Courts considered that the principle was not applicable. On the contrary, they have addressed the issue directly. For example, in *van den Bergh Foods*⁴¹⁹ the Court of First Instance, now the General Court, considered that the decision of the Commission to initiate proceedings under Article 101 TFEU, despite the existence of parallel proceedings before national courts, was appropriate in order to ensure that the European competition rules would be applicable coherently to the various forms of exclusivity practices by ice-cream manufacturers through the EU. As such the Court concluded that the Commission's decision respected the subsidiarity principle.⁴²⁰ In *SA Cimenteries CB*⁴²¹ the General Court, then the Court of First Instance, considered that it was compatible with the subsidiarity principle that the Commission dropped certain objections regarding a part of its investigation, leaving it to the discretion of

⁴¹⁹ Judgment of 23 October 2003, *Van den Bergh Foods v Commission*, T-65/98, EU:T:2003:281.

⁴²⁰ Judgment of 23 October 2003, *Van den Bergh Foods v Commission*, T-65/98, EU:T:2003:281, paragraph 199.

⁴²¹ Judgment of 15 March 2000, *Cimenteries CBR v Commission*, Joined cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, EU:T:2000:77.

the competition authorities of the Member States to take, if necessary, the measures they deemed appropriate in order to bring to an end the practices in question.⁴²² The *Cimenteries* case concerned a cartel investigation in the cement market. During the investigation proceedings, the Commission informed the national competition authorities that it had dropped the investigation of the national agreements and concerted practices and would only pursue the investigation of the practices that were Europe-wide. In the appeal of the Commission's decision, the appellant claimed that by doing so the Commission had violated the principle of subsidiarity as the matter fell within the scope of the EU interest. In the *France Télécom* case the General Court, then Court of First Instance, also evaluated the competence of the Commission to subject Wanadoo to an inspection under Article 20(4) Regulation 1/2003 under the subsidiarity principle. The decision of the Commission to subject Wanadoo to an inspection came in the context of a reduction of the price of ADSL services offered by Wanadoo, as well as other internet providers, following a decision by the French Minister of the Economy, Finances and Industry, of December 2003, approving a reduction of the wholesale rates charged by France Télécom for access to and reception of IP/ADSL. Several internet providers, including Wanadoo, decided then to pass on to that reduction in their retail offers. Previously, by a decision of January 2003, the Commission had considered that Wanadoo had abused its dominant position on the market for high-speed internet access services provided to residential customers by employing predatory prices. It then fined Wanadoo and imposed on it a duty to refrain from any behaviour having an object or effect identical or similar to that of the infringement and a duty to report information up to the end of 2006 on several aspects of its ADSL services. On 11th May 2004 the French Competition Council referred to the Commission a complaint received against Wanadoo for predatory pricing for investigation. On 18th May the Commission adopted the

⁴²² Ibid, paragraphs 752 to 754.

decision ordering France Télécom and all undertakings controlled by it, including Wanadoo and all undertakings directly or indirectly controlled by Wanadoo, to submit to an inspection under Article 20(4) Regulation 1/2003. That inspection was completed on the 4th July. France Télécom appealed the decision on several grounds including violation of Article 10 of Regulation 1/2003 resulting, *inter alia*, from an infringement of the division of powers and duty to cooperate in good faith with the national competition authorities under Regulation 1/2003. According to France Télécom, the French Competition Council would have been better placed to deal with the case. As such, the subsidiarity principle embodied in Article 10 of Regulation 1/2003 had been violated. The Court however considered that Protocol (No 2) on the application of the principles of subsidiarity and proportionality does not call into question the powers conferred on the EU by the Treaty as interpreted by the CJEU. Such powers include the power to apply competition rules, and in particular the right to carry out inspections to assess any suspected infringement.⁴²³

The EU Courts' approach to the exercise by the Member States of EU exclusive executive competence

The CJEU has recognised the possibility of the Member States to exercise the exclusive executive competence of the EU in two circumstances: as the exercise of the duty of sincere cooperation and as the exercise of delegated powers. In both situations, the EU Court imposes very restrictive conditions that are not compatible with the power it recognises to the Member States to enforce EU competition law.

The exercise by the Member States of EU exclusive executive competence under their duty of sincere cooperation

Article 4(3) TEU establishes that Member States "shall take any appropriate measure, general or particular, to ensure fulfilment of the obligation arising out of the Treaties from the acts of the institutions of the Union." The CJEU confirmed the possibility of the Member

⁴²³ Judgment of 8 March 2007, *France Télécom v Commission*, T-339/04, EU:T:2007:80, paragraph 89.

States to exercise exclusive competences of the EU under their duty of sincere cooperation.⁴²⁴ However, it attaches strict conditions for that exercise. In *Pluimveeslachterij Midden-Nederland BV and Pluimveeslachterij C. Van Miert BV* the Court confirmed the possibility of Member States to exercise competences that were exclusively attributed to the Commission, in a situation characterised by the absence of implementing measures by the EU. However, the Court also clarified that Member States action “must not be regarded as involving the exercise of the Member States’ own power, but as the fulfilment of the duty to cooperate [...]. Consequently, the measures adopted by the Member States may only be temporary and provisional in nature and they only must cease to be applied as soon as Community measures are introduced.”⁴²⁵ In *Bosch*⁴²⁶ and subsequent case law the Court confirmed the direct effect of now Articles 101(1) and 102 TFEU.⁴²⁷ As directly applicable, both national courts and competition authorities would be required to enforce those provisions under their duty of sincere cooperation, even if such competence was an exclusive competence of the EU. However, since 1962, the implementing measures necessary to enforce Articles 101 and 102 TFEU have been enacted, under Regulation 17/62. The possibility for the Member States to enforce EU competition law as the exercise of an EU exclusive competence under their duty of close cooperation is thus set aside. However, it could nevertheless be said that since the implementing measures have been enacted, Member States enforce EU competition law under delegated powers, framed first by Regulation 17/62 and now by Regulation 1/2003. Though, as I will argue next, the approach

⁴²⁴ Judgment of 28 March 1984, *Pluimveeslachterijen Midden-Nederland and Van Miert*, Joined cases 47/83 and 48/83, EU:C:1984:131.

⁴²⁵ Ibid.

⁴²⁶ Judgment of 6 April 1962, *De Geus en Uitdenboger v Bosch and others*, Case 13/61, EU:C:1962:11.

⁴²⁷ “As the prohibitions of Articles 85(1) and 86 [now 101(1) and 102 TFEU] tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard.” Judgment of 27 March 1974, *BRT v SABAM*, Case 127/73, EU:C:1974:25, paragraph 16.

of the EU Courts to the Member States' powers to enforce EU Competition law is not compatible with the exercise of delegated powers.

The exercise by the Member States of exclusive executive competence of the EU under delegated powers

Member States can exercise an exclusive competence of the EU under delegated powers, subject to strict limits that have been defined by the Court. In *Meroni*⁴²⁸ the Court limited the possibility of delegation of exclusive power to "clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority."⁴²⁹ Though *Meroni* concerns the delegation of powers to EU agencies, such dictum is sufficiently general to apply to public authorities.⁴³⁰ Furthermore, in *Grosoli*, which concerned the delegation of powers to the Member States in the field of Common Commercial Policy, the CJEU stated that delegation of administrative arrangements to the Member States cannot be regarded as going outside the confines of the technical and rules designed to ensure conformity with the general policy in question.⁴³¹

It is difficult to consider that the enforcement of EU competition law is limited to a technical exercise. As recognised by the EU Courts, the enforcement of EU competition law involves a degree of discretion⁴³² and complex economic assessments.⁴³³ As such, it would be

⁴²⁸ Judgment of 13 June 1958, *Meroni v Haute autorité*, Case 9/56, EU:C:1958:7.

⁴²⁹ Ibid.

⁴³⁰ *Meroni* was held in the context of the ECST Treaty. However, the principle of institutional balance under which *Meroni* was ruled, is applicable within the legal system of the EC Treaty, making *Meroni* doctrine applicable under the Lisbon Treaty. See Koen Lenaerts, 'Regulating the Regulatory Process: delegation of powers in the European Community' (1993) 18 *European Law Review*, 41.

⁴³¹ Judgment of 12 December 1973, *Grosoli*, Case 131/73, EU:C:1973:158, paragraph 8.

⁴³² Townley has showed that value judgements are constantly made, as even if we it could be agreed that that the sole goal of competition law is consumer welfare goal, re-distributive and political (more than merely re-distributive), issues still arise. Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)', 209.

⁴³³ There is voluminous jurisprudence to the effect that the review of the General Court when hearing "must undertake a comprehensive review of the examination carried out by the Commission, unless that examination entails a complex economic assessment, in which case the review of the Court is confine at ascertaining that there has been no misused of powers, that the rule of procedure and the statement of reasons have been complied with, that the facts have been accurately stated and that there has been no manifest error of assessment of those acts..." Judgement of 27 September 2006, *GlaxoSmithKline Services v Commission*, T-168/01, EU:T:2006:265. See Bo Vesterdorf, 'Certain

incompatible with delegation. Even if delegation could be accepted, under the Meroni doctrine, the exercise of delegated powers by the Member States should be subject to “strict review in the light of objective criteria determined by the delegating authority.”⁴³⁴ The EU Courts however, do not recognise to the Commission any specific power to direct Member States’ action when enforcing EU competition law compatible with the exercise of delegated powers. In *LVM*⁴³⁵ the General Court, then European Court of First Instance, stated that “the extents of the Commission’s obligations in the field of competition law must be considered in the light of Article [105(1)] of the Treaty, which constitutes the specific expression in this area of the general supervisory role conferred on the Commission by Article 155⁴³⁶ of the Treaty.”⁴³⁷ None of the provisions confers on the Commission any specific power to direct the Member States in their enforcement actions. The Court also recognised in *LMV* that the supervisory role conferred upon the Commission under Article 105 TFEU “also encompasses the duty to pursue a general policy designed to apply competition matters, the principles laid down by the Treaty (...).”⁴³⁸ I.e. the CJEU recognises that the Commission has policy control in the field of competition. However, once again, such control is not binding. The Commission has been enacting under Article 105 TFEU a number of guidelines, notices and communications on the interpretation of Articles 101 and 102 TFEU. The power of the Commission under Article 105(1) TFEU does not include however the power to determine

reflections on recent judgments reviewing Commission merger control decisions' in Mark Hoskins, William Robinson and David Alexander Ogilvy Edward (eds), *A true European - Essays for judge David Edward* (Hart 2003)

⁴³⁴ Judgment of 13 June 1958, *Meroni v Haute autorité*, Case 9/56, EU:C:1958:7.

⁴³⁵ Judgment of 20 April 1999, *LVM v Commission*, Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80.

⁴³⁶ Article 155 EC Treaty was replaced by Article 211 TEU. This article was repealed by the Treaty of Lisbon, but it was replaced in substance by Article 17 (1) TEU.

⁴³⁷ Judgment of 20 April 1999, *LVM v Commission*, Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80, paragraph 148. In the same sense Judgment of 14 July 2004, *Parker Pen v Commission*, T-77/92, EU:T:1994:85, paragraph 63.

⁴³⁸ Judgment of 20 April 1999, *LVM v Commission*, Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80, paragraph 149 and Judgment of 7 June 1983, *Musique Diffusion française v Commission*, Joined cases 100 to 103/80, EU:C:1983:158, paragraph 105.

the content of Articles 101 and 102 TFEU. Given the direct effect of these provisions, the Commission is bound by the interpretation of the CJEU of Articles 101 and 102 TFEU. As pointed out by Wills “[o]n questions of interpretation on which the Court has not yet spoken, the Commission may provide its own interpretation, provided that these additions are coherent with the case law of the CJEU and that the communication does not create any confusion as to what is the Court’s case law and what is the Commission’s interpretation is binding.”⁴³⁹

For example, in *Visa* the CJEU accepted the interpretation of the Commission on the notion of “potential competitor” for the purposes of Article 101 TFEU stated on its Guidelines on horizontal cooperation agreements because,

*It is clear that such a definition reproduces, and clarifies, the tests deriving from the case-law [...]. Consequently, since that definition does not appear to be inconsistent with the relevant case-law, it can be taken into account in order to determine whether the Commission was justified in describing Morgan Stanley as a potential competitor.*⁴⁴⁰

Also, in *Expedia*⁴⁴¹ the Court confirmed that Member States are not bound by the Commission notices on the interpretation of Articles 101 and 102 TFEU except if they acknowledge the principles set out therein and that they will abide by them. In *Expedia*, the Court held that the Commission’s *de minimis* notice was not binding for both national competition authorities and the courts of the Member States. The Court considered that, because the notice did not contain any reference to declaration by the competition authorities of the member states that they acknowledge the principles set out therein and that they will abide by them, it could not bind them. The Court distinguished this with the situation regarding the Commission Notice on cooperation within the Network of

⁴³⁹ Wouter P.J. Wils, 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement' (2011) 34 World Competition , 369.

⁴⁴⁰ Judgment of 14 April 2011, *Visa Europe and Visa International Service v Commission*, T-461/07, EU:T:2011:181, paragraph 172.

⁴⁴¹ Judgment of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, paragraph 26.

Competition Authorities⁴⁴² that national competition authorities have acknowledged to be applicable to them. National competition authorities have signed a statement in the form of the Annex to that Notice, acknowledging the principles of the notice and declaring that they will abide by them. It could be argued that the lack of policy control by the Commission of the Member States action could be overcome by the exercise of an administrative control binding on the national competition authorities. However, as previously seen the Commission does not have such type of administrative control over the Member States administrative action in enforcing EU competition law.

A specific supervisory power over the Member States administrative action can nevertheless result from secondary law. Such, however, is not the case regarding EU competition law enforcement by the Member States. Regulation 1/2003 establishes mechanisms of cooperation between the Commission and the national competition authorities that allow some sort of supervision. However, it does not give to the Commission the power to instruct national competition authorities over substantive outcomes. For example, Article 11(4) of that Regulation requires the national competition authorities to inform the Commission no later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation.⁴⁴³ It also establishes the possibility for the Member States to consult the Commission in any case involving the application of EU competition law.⁴⁴⁴ However, the Commission has no binding powers to commandeer the competition authorities of the Member States to achieve a certain result. In case of substantial disagreement with a

⁴⁴² Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/43.

⁴⁴³ Article 11(4) Regulation 1/2003. To that effect, national competition authorities shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the purpose of the action. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States.

⁴⁴⁴ Article 11 (5) of Regulation 1/2003.

national competition authority that refuses to change its view in a concrete case, the only possibility for the Commission is to initiate proceedings before the national authority adopts a final decision. The national authority will be then relieved of its powers to apply Articles 101 and 102 TFEU.⁴⁴⁵

Moreover, the Commission does not have the “monopoly” of control of the Member States enforcement action under Regulation 1/2003. A competition authority of a Member States can ask for a case of another competition authority under Article 101 and 102 TFEU to be discussed in an advisory Committee.⁴⁴⁶ For this purpose, the cooperation mechanisms set in place by Regulation 1/2003 establish that the information that is sent to the Commission no later than 30 days before the adoption of a decision under Articles 101 and 102 TFEU can also be sent to the other national competition authorities.⁴⁴⁷ National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 101 or Article 102 of the Treaty. Finally, it must be mentioned that also the Member States exercise a control over the Commission’s enforcement action under Articles 101 and 102 TFEU. Such situation is not compatible with the exercise by the Commission of an exclusive competence of the EU. Article 14 of Regulation 1/2003 establishes that the Commission shall consult an Advisory Committee on Restrictive Practices and Dominant Position prior to the taking of an enforcement decision.⁴⁴⁸ The Advisory Committee is composed of representatives of the competition authorities of the Member States.⁴⁴⁹ The Advisory Committee shall deliver a written opinion on the Commission's preliminary draft decision⁴⁵⁰ that the Commission shall

⁴⁴⁵ Article 11 (6) of Regulation 1/2003.

⁴⁴⁶ Article 14 (7) of Regulation 1/2003.

⁴⁴⁷ Article 11(4) of Regulation 1/2003.

⁴⁴⁸ A decision under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1) of Regulation 1/2003 (Article 14 (1) Regulation 1/2003).

⁴⁴⁹ Article 14(2) of Regulation 1/2003.

⁴⁵⁰ Article 14(3) of Regulation 1/2003.

take the utmost account of.⁴⁵¹ Moreover, the Commission shall also inform the Committee of the manner in which its opinion has been taken into account.⁴⁵²

The degree of control that the Commission exercises over the Member States' enforcement action in the field of competition contrasts radically with the control it exercises in areas of decentralised enforcement by the Member States of EU exclusive competences. Such is the case for example, of the Member States delegated administrative action in financial management. The financial Regulation allows for a possible allocation of competences for budgetary implementation in the form of shared or decentralized management.⁴⁵³ Implementation tasks may be delegated to the Member States under Article 58(b) of the Financial Regulation. In such case though the Commission assumes the "control of the control"⁴⁵⁴ in respect to the administrative system applying in the Member States. The Commission can apply clearance-of-accounts procedures or financial correction mechanisms,⁴⁵⁵ which enables it to assume final responsibility for the implementation of the budget. There is no such type of degree of control when it comes to the implementation of EU competition law.

It follows from the above that the EU executive competence under Article 105 TFEU has always been shared and it remained shared after the Treaty of Lisbon as per Article 4(1) TFEU.

Conclusion

This chapter has identified relevant limits to the exclusive competence of the EU under Article 3(1)(b) TFEU. Firstly, it has been shown that Member States did not confer unlimited

⁴⁵¹ Article 14(5) of Regulation 1/2003.

⁴⁵² Article 14(5) of Regulation 1/2003.

⁴⁵³ Article 58 (b), European Parliament and of the Council Regulation (EU, Euratom) 966/2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) 1605/2002 [2012] OJ L 298/248

⁴⁵⁴ Hofman, Rowe and Türk, *Administrative Law and Policy of the European Union*, 752.

⁴⁵⁵ Articles 59(a)(6), 60(b)(6) of the Financial Regulation.

jurisdiction on the EU in the area of competition. Article 3(1)(b) TFEU limits EU exclusive competence to establish the competition rules only when they are “necessary to the functioning of the internal market.” No other provision in the Treaty allows the EU to act where the situation has no relevance to the functioning of the internal market. Therefore, such competence as per Article 4(1) TFEU has remained with the Member States.

Secondly, this chapter concluded that the exclusive competence under Article 3(1)(b) TFEU has been framed in a way that it does not include executive competence in competition matters. That provision limits the exclusive competence of the EU to the area of “establishing of the competition rules.” This is a competence of a legislative nature. Accordingly, Article 3(1)(b) TFEU does not encompass the competence to enforce EU competition rules. The EU has executive competence under Article 105 TFEU to enforce Article 101 and 102 TFEU. Such competence is shared with the Member States *as per* Article 4(1) TFEU. The subsidiarity principle, favouring an action at national level remains applicable and Member States enforce EU competition law in their own right. Therefore, constitutional arrangements regarding the enforcement of EU competition law do not require Member States to enforce EU competition law as mandated by the EU, as would be the case if that competence was exclusive to the Union.

Pursuant to Article 2(6) TFEU, the scope of the competence conferred on the Union is determined by the legal bases relating to each area. The difference between the several types of EU competences is of a relational kind: exclusive competence excludes other authorities from acting within the same policy area.⁴⁵⁶ To complete the picture, it is necessary to explore further the scope of the legal basis provided by Article 3(1)(b) TFEU. This analysis is pursued in the next chapter.

⁴⁵⁶ Schütze, *European Constitutional Law*, 163.

Chapter 4 - The inner boundaries of Article 3(1)(b) TFEU - The enabling provisions

This chapter carries forward the analysis of the scope of the EU exclusive competence in the field of competition discussed in the previous chapter, discussing the boundaries imposed by the legal bases enabling the EU to act in the use of its competence under Article 3(1)(b) TFEU. To identify which provisions of the Treaties relate to the “establishing of the competition rules necessary for the function of the internal market” under article 3(1)(b) TFEU is not a simple task as the following example illustrates well. Agriculture is a sector specifically identified in Article 4(2)(d) TFEU as being under the shared competence of the EU. Article 40(1)(a) TFEU requires the adoption of common rules on competition in the context of a common organisation of agricultural markets. This provision is a legal basis that enables the EU to establish competition rules necessary for the functioning of the internal market, insofar as the agriculture sector is engaged. Does this mean that competence under Article 40(1)(a) TFEU is exclusive under Article 3(1)(b) TFEU, despite Article 4(2)(d) TFEU? Is it an island of exclusive power of the EU in a shared field? This is the type of challenge that the identification of the legal bases enabling the Union to act under Article 3(1)(b) TFEU raises and that will be dealt with in Section 1 of this chapter. Section 2 will then debate the boundaries to the legislative competence exclusive to the EU that follow from those enabling legal basis. Finally, Section 3 explores the legal bases that may enable the EU to legislate on competition matters outside the scope of the legislative competence under Article 3(1)(b) TFEU, i.e. in the use of a shared competence with the Member States.

1. The legal bases relating to the area of “the establishing of the competition rules necessary for the functioning of the internal market”

As per Article 2(6) TFEU, the scope and arrangement for the exercise of a competence are determined by the provisions of the Treaty related to each area. The inner boundaries of the exclusive competence under Article 3(1)(b) TFEU is defined by these provisions. The question then is which provisions of the Treaty determine the scope and the arrangements for the exercise of the EU’s competence under Article 3(1)(b) TFEU?

The CJEU dealt with this question in *Spain and Italy v Council*.⁴⁵⁷ The case concerned an appeal lodged by Spain and Italy against the EU Unitary Patent. These Member States claimed, *inter alia*, that the creation of European intellectual rights to provide uniform protection of intellectual property rights as found in Article 118 TFEU was not within the ambit of one of the competences shared by the Member States and the EU. It was rather within the exclusive competence of the EU as provided for in Article 3(1)(b) TFEU concerning “the establishing of the competition rules necessary for the functioning of the internal market.”⁴⁵⁸ Therefore, they argued that the Council did not have competence to authorise the enhanced cooperation in question, because Article 20(1) TEU limits enhanced cooperation to areas of shared competence.⁴⁵⁹ The CJEU did not agree with this reasoning. It ruled that the competences conferred by Article 118 TFEU fall within an area of shared competence for the purpose of Article 4(2) TFEU and are therefore non-exclusive.⁴⁶⁰ The CJEU stressed that “it is to be borne in mind that the area of the “internal market” mentioned in Article 4(2)(a) TFEU refers, in accordance to the definition given in Article 26(2) TFEU, to

⁴⁵⁷ Judgment of 16 April 2013, *Spain and Italy v Council*, Joined cases C-274/11 and C-295/11, EU:C:2013:240.

⁴⁵⁸ Ibid, paragraph 10.

⁴⁵⁹ Ibid, paragraph 11.

⁴⁶⁰ Ibid, paragraph 25.

“an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.”

Article 26(1) TFEU provides that the EU is to “adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.”⁴⁶¹ The CJEU considered that the expression “relevant provisions of the Treaties” makes it clear that competence falling within the sphere of the internal market is not limited to Articles 114 and 115 TFEU relating to the adoption of harmonisation measures. It also covers any competence attached to the objectives set out in Article 26 TFEU, such as the competences conferred on the EU by Article 118 TFEU.⁴⁶² While it recognized that the rules on intellectual property are essential in order to maintain undistorted competition on the internal market, the Court considered that they do not constitute competition rules for the purpose of Article 3(1)(b) TFEU.⁴⁶³ The Court recalled that under Article 2(6) TFEU the scope and the arrangements for exercising the EU’s competence are to be determined by the provisions of the Treaties relating to each area.⁴⁶⁴ Therefore, the scope of the exclusive competence under Article 3(1)(b) TFEU must be found in Part Three, Title VII, Chapter 1 TFEU, in particular Articles 101 to 109 TFEU.⁴⁶⁵

The reasoning of the CJEU could have been more developed. However, I agree with the result. The CJEU failed to explain why it considers that the EU Unitary Patent is not within the meaning of competition rules necessary for the functioning of the internal market under Article 3(1)(b) TFEU, despite accepting that it is essential to keep competition undistorted in the internal market.⁴⁶⁶ It simply stated that the expression “relevant provisions of the Treaties” in Article 2(1) TFEU makes it clear that competence falling within the sphere of the

⁴⁶¹ Ibid, paragraph 20.

⁴⁶² Ibid, paragraph 21.

⁴⁶³ Ibid, paragraph 22.

⁴⁶⁴ Ibid, paragraph 23.

⁴⁶⁵ Ibid, paragraph 23.

⁴⁶⁶ Ibid, paragraph 22.

internal market also includes that conferred by Article 118 TFEU. As to why it was not within the exclusive competence of the EU under Article 3(1)(b) TFEU, the CJEU took a formalistic approach. It only stated that because there was a section in the Treaty dealing with competition rules - Part Three, Title VII, Chapter 1 TFEU - the scope of the competence under Article 3(1)(b) TFEU needs to be determined against these provisions and not elsewhere in the Treaty. However, this is not a highly compelling reason. The competence under that Article 3(1)(b) TFEU is not defined in terms of a policy area, such as “competition,” but in terms of an action, i.e. “the establishing of the competition rules necessary for the functioning of the internal market”. The CJEU itself refers to “the area of establishing of competition rules necessary for the functioning of the internal market”⁴⁶⁷ and not the area of “competition.” The wording of Article 3(1)(b) TFEU is very distinct from the rest of the subsections therein, which determine the exclusive competence of the EU in reference to a policy area: e.g. the “customs union” - Article 3(1)(a); the “monetary policy for the Member States whose currency is the euro” - Article 3(1)(c); the “conservation of marine biological resources under the common fisheries policy” - Article 3(1)(d) and the “common commercial policy” - Article 3(1)(e). In relation to these policy areas it is possible to identify with clarity “the provisions of the Treaties relating to each area” against which the scope of the exclusive competence shall be defined as per Article 2(6) TFEU. The part of the Treaty dealing with the policy area of “Customs Union” corresponds to Part III, Title II, Chapter 1 TFEU; the one dealing with “Monetary Policy” corresponds to Part III, Title VIII, Chapter 2 TFEU; the “Conservation of Marine biological resources under the common fishery policy” is covered by Part Three, Title III TFEU; and finally the “Common Commercial Policy” is under Part V, Title II TFEU. The same is not true when it comes to the area of “establishing of the competition rules necessary for the functioning of the internal market.” It could therefore

⁴⁶⁷ Ibid, paragraph 24.

be argued that, irrespectively of its place in the Treaties, if a legal basis enabling the EU to enact acts of legislative nature on competition regarding internal market is found, that competence is exclusive as per Article 3(1)(b) TFEU. The CJEU rejected this approach.

However sparse, I agree with the CJEU ruling in *Spain and Italy v Council*. To decide otherwise would be to accept the existence of an open textured exclusive competence of the EU under Article 3(1)(b) TFEU. This would run against the objectives of the clarification of the competences of the EU under the Treaty of Lisbon and, much more importantly, against the principle of conferral. To accept that reasoning would have the consequence of transforming competence in areas that are under the shared competence of the EU into an exclusive competence to the EU. An example of this is provided by the competence to adopt competition rules for the agricultural sector. Article 40(1)(a) TFEU requires the adoption of common rules on competition in the context of a common organisation of agriculture markets. Agriculture is a sector specifically identified in Article 4(2)(d) TFEU as being under the shared competence of the EU.

The fact that there is a legal basis under the Treaties for establishing rules on competition affecting the internal market does not of itself establish that the EU has exclusive competence under Article 3(1)(b) TFEU; otherwise the adoption of common rules of competition under Article 40(1)(a) TFEU would be transformed into an exclusive competence without any express wording to that effect. This is not compatible with the principle of conferral, as Article 40 TFEU is within the part of the Treaty referring to the internal market, that is under the shared competence.⁴⁶⁸

The Advocate General followed this same line of thought and provided a developed reasoning on why the scope of EU exclusive competence under Article 3(1)(b) TFEU is to be found in the provisions within Part Three, Title VII, Chapter 1 TFEU – i.e. the section of the

⁴⁶⁸ Article 4(2)(d) TFEU.

Treaty dealing with “Competition Rules.”⁴⁶⁹ He started by stressing that the purposes of introducing a categorisation of competences between the EU and the Member States was the desire of the Member States that the sharing of competence between the EU and the Member States be clarified and made more transparent. To that aim the Treaty of Lisbon introduced a categorisation of competences that determined the sharing of competence between the EU and the Member States in accordance with the principle of conferral. The Advocate General then compared the wording of Article 3(1) TFEU with that of Article 4(2) TFEU, concluding that the areas under the exclusive competence of the EU are not merely indicative but exclusive. Whereas Article 3(1) indicates that “[t]he Union shall have competence *in the following areas*”, Article 4(2) TFEU indicates that “[s]hared competence between the Union and the Member States applies to the *following principal areas*.”⁴⁷⁰ Finally the Advocate General considered that the principle of conferral could only be respected if the list of the exclusive competence of the EU provided for in Article 3(1) TFEU is exhaustive. This is because under that principle the EU can only act within the limits of the competences that have been conferred on it by the Member States. Competences not conferred on the EU belong to the Member States.⁴⁷¹ The inner boundaries of the exclusive competence under Article 3(1)(b) TFEU must thus be determined by Part Three, Title VII, Chapter 1 TFEU.

The question that now follows is what is the scope of the EU exclusive competence under Article 3(1)(b) TFEU as per Part Three, Title VII, Chapter 1 TFEU? The answer will be given by the legal basis for action that can be found within that specific part of the Treaty allowing for the establishment of “rules”. It has been submitted that rules, for the purposes of Article

⁴⁶⁹ Opinion of Advocate General Bot of 11 December 2012, *Spain and Italy v Council*, Joined cases C-274/11 and C-295/11, EU:C:2012:782.

⁴⁷⁰ Ibid, paragraphs 41 to 50.

⁴⁷¹ Ibid, paragraphs 51.

3(1)(b) TFEU, must be understood as acts of a legislative nature.⁴⁷² Therefore, only provisions that allow for the adoption of acts of a legislative nature will be considered for the purpose of determining the scope of the exclusive competence under Article 3(1)(b) TFEU. However, before exploring those legal bases, a prior consideration as to the concept of legislative acts must be made. The Treaty of Lisbon introduced for the first time a distinction between legislative acts and non-legislative acts, depending on the procedures followed for their adoption. Under Article 289(3) TFEU, legal acts are those acts that are adopted by legislative procedure.⁴⁷³ A legislative act will be a legal act adopted by the ordinary legislative procedure under Article 289(1) TFEU, consisting in the joint adoption by the European Parliament and the Council of a regulation, directive or a decision on the proposal from the Commission. The ordinary legislative procedure is defined in Article 294 TFEU as that “which replicates, with certain modifications, the former co-decision procedure.”⁴⁷⁴ According to Article 289(3) TFEU, legislative acts can also be enacted under a special legislative procedure. By defining a legislative act depending on the procedures under which it has been enacted, the Treaty adopts a formal criterion to define legislative acts. Under this formal criterion, a quick reading of the provisions under Part Three, Title VII, Chapter 1 TFEU allows us to conclude that none of the provisions therein enables the EU to enact legislative acts. This is because, though several provisions therein allow for the adoption of legally binding acts (Articles 103, 105(3), 106(3), 108(4) and 109 TFEU) they do not provide for such acts to be enacted under the ordinary or special legislative procedure. This remains true in respect of Article 103(1) TFEU which establishes a procedure for the adoption of regulations of directives by the Council that, in Turk’s words, is “indistinguishable from the special legislative procedure

⁴⁷² It has been submitted that the notion of “rules” for the purpose of Article 3(1)(b) TFEU does not include individual decisions.

⁴⁷³ There are two types of legislative procedures: “ordinary” (Article 289(1) TFEU) and “special” (Article 289(2) TFEU).

⁴⁷⁴ Alexander H. Türk, 'Lawmaking after Lisbon' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford University Press 2012), 68.

under Article 289(2) TFEU.”⁴⁷⁵ This provision however does not amount to the special legislative procedure as provided for in Article 289(2) TFEU. This provision states that the special legislative procedure applies “in the specific cases provided for by the Treaties” and “the pattern throughout the Treaties is that where a special legislative procedure is intended to apply this is expressly signified in the relevant Treaty Article. There is no such signification in Article 103 TFEU.”⁴⁷⁶ Therefore, under the formal definition of legislative act as established by the Treaty of Lisbon the EU has no legislative powers under Article 3(1)(b) TFEU as no provision within Part Three, Title VII, Chapter 1 TFEU allows the EU to adopt formal legislative acts.

I argue however, that legislative acts in the EU legal order after the Treaty of Lisbon are not limited to formal legislative acts. Prior to the Treaty of Lisbon, the CJEU had already identified a hierarchy of legal acts. As held in *Köster, Berodt & Co*,⁴⁷⁷

“[B]oth the legislative scheme of the [TFEU], reflected in particular by the last indent of Article 155 [Article 211 EC] and the consistent practice of the Community institutions establish a distinction, according to the legal concepts recognized in all the Member States between measures directly based on the Treaty itself and derived law intended to ensure their application.”

The CJEU establishes a hierarchy between acts based directly on the EC Treaty, i.e. basic acts, and implementing acts. As argued by Türk, the Treaty of Lisbon did not invent a hierarchy of norms between legislative and non-legislative acts, it simply made it more visible.⁴⁷⁸ It did not replace it.⁴⁷⁹ Legally binding acts of general application that find their legal basis directly in the Treaty are therefore acts of a legislative nature.

⁴⁷⁵ Ibid, 69.

⁴⁷⁶ Craig, *The Lisbon Treaty, Law, Politics, and Treaty Reform*, 257.

⁴⁷⁷ Judgment of 17 December 1970, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster*, Case 25/70, EU:C:1970:115, paragraph 6.

⁴⁷⁸ Türk, 'Lawmaking after Lisbon', 66.

⁴⁷⁹ In the same sense see Craig, *The Lisbon Treaty, Law, Politics, and Treaty Reform*, 259-60.

In this light, there are three provisions within Part Three, Title VII, Chapter 1 TFEU that can be identified as possible legal bases to establish “rules” on competition applicable to undertakings for the purposes of Article 3(1)(b) TFEU.⁴⁸⁰ They are Articles 103, 105(3) and 106(3) TFEU. The scope of the exclusive legislative competence under Article 3(1)(b) TFEU will be given by these provisions. It is argued that none of them allows the EU to establish substantive principles of EU competition law.

2. Exclusion of the competence to establish substantive principles of EU competition law

EU action under Article 103 TFEU

Article 103(1) TFEU states that:

“The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.”

Under Article 103(2) TFEU regulations or directives adopted by the Council to give effect to principles set out in Articles 101 and 102 TFEU “*shall be designed in particular:*

- a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provisions for fines and periodic penalty payments;*
- b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;*
- c) to define, if need be, in the various branches of the economy, the scope of the provisions of Article 101 and 102;*

⁴⁸⁰ There are two other legal basis enabling the adoption of “rules” for the purpose of Article 3(1)(b) TFEU: Articles 108(4) and 109 TFEU concerning State Aid. These provisions are in Section 2 of Part three, Title VII, Chapter 1 TFEU deals with the “Aids granted by States.” This is outside the scope of this thesis so they will not be analysed here.

- d) *to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;*
- e) *to determine the relation between national laws and the provisions contained in this Section or adopted pursuant to this Article.”*

Competence under Article 103 TFEU seems to be drafted in a wide manner. First, Article 103(1) TFEU requires the Council to “give effect to the principles set out in Articles 101 and 102 TFEU.” Secondly, the list of matters to be dealt with by the Council under Article 103(2) TFEU is considerably broad. As pointed out by Townley, it is an open list, not exhaustive of all the matters that can be covered by the action of the EU under Article 103(1) TFEU.⁴⁸¹ It is submitted however, that the scope of the powers under Article 103 TFEU is rather limited to procedural implementation of Articles 101 and 102 TFEU. It does not provide the EU with a general legislative competence on substantive rules of competition. This is because Articles 101 and 102 have direct effect.⁴⁸²

Starting with the list of matters under Article 103(2) TFEU, a quick reading of sub-paragraphs (a) and (d) allows us to understand that powers therein concern the adoption of procedural rules for the enforcement of Articles 101 and 102 TFEU only. Those rules were first enacted under Regulation 17/62, which was later replaced by Regulation 1/2003. In *Akzo*,⁴⁸³ the CJEU confirmed that “the rules of procedure with respect to competition law, as set out in Article 14 of Regulation 17/62 and Article 20 of Regulation 1/2003, are part of the provisions

⁴⁸¹ Townley, 'Constitutional limits to diversity (and Co-ordinated diversity) in EU competition law', 20.

⁴⁸² Normally, the dimension of the direct effect of Articles 101 and 102 EEC Treaty is horizontal, i.e it can be invoked in court against a private party. However, it can also have a vertical dimension, and be invoked against a Member State when it enacts provisions that run against the said provisions in breach of their cooperation duty. The CJEU excluded the direct effect of the Treaty's competition provisions regarding public undertakings (Article 90 EEC Treaty), see Judgment of 14 July 1971, *Muller*, Case 10/71, EU:C:1971:85; Judgment of 15 July 1964, *Costa v E.N.E.L.*, Case 6/64, EU:C:1964:66; Judgment of 22 March 1977, *Ianelli v Meroni*, Case 74/76, EU:C:1977:51; Judgment of 22 March 1977, *Steinike und Weinlig*, Case 78/76, EU:C:1977:52.

⁴⁸³ Judgment of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, C-550/07 P, EU:C:2010:512.

necessary for the functioning of the internal market whose adoption is part of the exclusive competence conferred on the Union by virtue of Article 3(1)(b) TFEU.”⁴⁸⁴ The exclusive competence of the EU to legislate on the procedural rules to be used by the Commission in its enforcement procedures has been considered by some authors as nothing more than logical, for accepting Member States’ power to legislate in this context would render the uniform and effective application of EU competition law by the Commission difficult.⁴⁸⁵

In contrast, competences under Article 103(2)(b), (c) and (d) TFEU seem to go beyond the mere procedural aspects of the implementation of Articles 101 and 102 TFEU. Under Article 103(2)(b) TFEU the Council may adopt detailed rules for the application of Article 101(3). Those rules were first enacted in Regulation 17/62 which implemented a centralised notification and authorisation system by the Commission to enforce Article 101(3) TFEU. This was abolished by Regulation 1/2003 which introduced a system of decentralised, *ex post* enforcement. Such rules are of a procedural nature, determining the procedures under which an agreement can be exempted under Article 101(3) TFEU. However, this provision also enables the Council to adopt block exemption regulations, as well as regulations empowering the Commission to do the same.⁴⁸⁶

A block exemption regulation identifies types of agreements in relation to which the prohibition of Article 101(1) TFEU does not apply. Some of these regulations covered

⁴⁸⁴ Ibid, paragraph 116.

⁴⁸⁵ Monti, 'Legislative and Executive Competence in Competition Law', 110.

⁴⁸⁶ E.g. Regulation (EEC) 19/65 of the Council on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices [1965] OJ 36/533; Council Regulation (EEC) 2821/71 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices [1971] OJ L 285/46; Council Regulation (EC) 487/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [2009] OJ L148/ 1; Council Regulation (EEC) 1534/91 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector [1991] OJ L 143/1; Council Regulation (EC) 246/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) [2009] OJ L79/1.

agreements in general, others covered agreements in specific sectors of the economy.⁴⁸⁷ It could be argued that under Article 103(2)(b) TFEU the EU was competent to establish the prohibitions of Article 101(1) and the exceptions under Article 101(3) TFEU. Such competence would be exclusive as per Article 3(1)(b) TFEU. Moreover, Article 103(2)(c) TFEU specifically authorises the Council “to define, if need be, in the various branches of the economy, the scope of the provisions under Article 101 and 102 TFEU.” Further, Article 103(2)(e) and (c) TFEU appears to confer competence to the Council to determine the scope of Article 101 and 102 TFEU as regards the various branches of the economy and the national laws, respectively. This would imply a legislative competence to establish substantive principles of EU competition law. Such competence would be exclusive to the EU under Article 3(1)(b) TFEU.

However, I argue that none of these provisions confers the power to the EU legislator to establish the competition principles under Articles 101 and 102 TFEU, since that would be incompatible with the direct effect of these provisions, which remained unchanged under the Treaty of Lisbon.

The impact of the direct effect of Articles 101 and 102 TFEU on the scope of the legislative powers under Article 103 TFEU

Legislative powers under Article 103 TFEU are “to give effect to the principles set out in Articles 101 and 102 TFEU.”⁴⁸⁸ The direct effect of Articles 101 and 102 TFEU has two main consequences on the scope of the Council’s powers under Article 103 TFEU. First, a measure enacted under Article 103 TFEU cannot and does not determine the content of Articles 101

⁴⁸⁷ E.g. Commission Regulation (EU) 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2010] OJ L 335/36; Commission Regulation (EU) 1218/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements [2010] OJ L 335/43; Commission Regulation (EU) 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/1; Commission Regulation (EC) 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements OJ L123/11.

⁴⁸⁸ Article 103(1) TFEU.

and 102 TFEU. Secondly, the relation between those provisions and national laws is governed by the primacy principle.

The content of Articles 101 and 102 TFEU is not determined by the measure adopted under Article 103 TFEU

EU law defines direct effect acts “as a potential source of directly enforceable rights and obligations for individuals and public authorities.”⁴⁸⁹ Direct effect of an act is not incompatible with the adoption of implementing acts.⁴⁹⁰ However, the scope of implementing powers is limited. There is a consistent body of case law of the CJEU that implementing measures of an act vested with direct effect are to “make easy” but they cannot in any way limit the content of the act they aim at implementing.⁴⁹¹ That would be denying the direct effect of the act. As stressed by Advocate General Kokott in her opinion in *Impact*:

*“the mere fact that a [EU]-law provision is described as a “principle” [...] and incorporates undefined terms [...], does not mean that the provision lacks precision as to its substance and therefore is not directly effective. Instead, any doubts as to the interpretation of such terms can be resolved by means of a reference for preliminary ruling.”*⁴⁹²

Therefore,

“[i]mplementing measures are to make easy but in any case dependent the enforcement of those basic principles. They cannot, in any way, relate to the actual

⁴⁸⁹ Dashwood and others, *Wyatt and Dashwood's European Union law*, 237.

⁴⁹⁰ We are now towards a test of justiciability to evaluate the capacity of a EU law to have direct effect. See e.g. Chalmers, Davies and Monti, *European Union Law - Text and Materials*, 295.

⁴⁹¹ Judgment of 21 June 1974, *Reyners v Belgian State*, Case 2/74, EU:C:1974:68, paragraphs 21 and 26; Judgment of 19 January 1982, *Becker*, Case 8/81, EU:C:1982:7, paragraphs 32, 33 and 39; Judgment of 15 January 1986, *Hurd v Jones*, Case 44/84, EU:C:1986:2, paragraphs 47; Judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraphs 66 and 67. See also, Pierre Pescatore, 'The doctrine of "direct effect": an infant disease of Community law' (1983) 8 *European Law Review* 155 162

⁴⁹² Opinion of Advocate General Kokott of 9 January 2008, *Impact*, C-268/06, EU:C:2008:2, paragraph 98. The contended principle was the “principle of non-discrimination” under the Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, that incorporates undefined legal terms such as ‘working conditions’ or ‘conditions of employment’ [1999] OJ L175/43.

*substance of the principles, limit the existence or restrict the scope of that principles.*⁴⁹³

Legislative acts generally are to some extent vague and open textured.⁴⁹⁴ This is particularly true of competition rules.⁴⁹⁵ However, this does not affect their nature as directly applicable acts. They are a direct source of rights and obligations for natural and legal persons as well as for public authorities. The consequence of the vagueness of an EU act vested with direct effect is not that its content needs to be determined by an implementing act. It simply means that it may require an interpretation to be applied in specific cases.⁴⁹⁶ The ultimate responsible for the interpretation of Article 101 and 102 TFEU is the CJEU, by virtue of Article 19 TEU. As stated by the General Court in *AC-Treuhand AG* as regards the content of Article 101 TFEU:

*“the interpretation of the undefined legal concept of “agreement between undertakings” ultimately falls to be determined by the Community judicature(...).”*⁴⁹⁷

This represents an important limitation to the scope of the powers of the Council under Article 103 TFEU. Measures pursuant to Article 103 TFEU cannot “in any way relate to the actual substance” of the principles contained in those provisions⁴⁹⁸ and “they cannot therefore limit the existence or restrict the scope of [those principles].”⁴⁹⁹

The approach of the CJEU to block exemptions evidences this point well. Block exemptions are acts adopted pursuant to Article 103 TFEU. As such, they cannot determine the content

⁴⁹³ Opinion of Advocate General Kokott of 9 January 2008, *Impact*, C-268/06, EU:C:2008:2, paragraph 67.

⁴⁹⁴ Hart, *The concept of law* Vijay K. Bhatia and others, *Vagueness in Normative Texts* (Peter Lang 2005).

⁴⁹⁵ Wils, 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement'.

⁴⁹⁶ Judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraphs 66-67.

⁴⁹⁷ Judgment of 8 July 2008, *AC-Treuhand v Commission*, T-99/04, EU:T:2008:256, paragraph 163.

⁴⁹⁸ Judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraphs 66-67, quoting, by analogy, Judgment of 19 January 1982, *Becker*, Case 8/81, EU:C:1982:7, paragraphs 32 and 33

⁴⁹⁹ Judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 67. See, by analogy, Judgment of 19 January 1982, *Becker*, Case 8/81, EU:C:1982:7, paragraph 39 and Judgment of 21 June 1974, *Reyners v Belgian State*, Case 2/74, EU:C:1974:68, paragraph 39.

of the prohibition of Article 101 TFEU. The first time the CJEU dealt with the legality of a block exemption regulation was in *Italy v Council*.⁵⁰⁰ The Italian government asked for the annulment of the Council Regulation 19/65 relating to the application of Article 101(3) TFEU (then Article 85(3) EEC Treaty) to certain categories of agreements and concerted practices. The CJEU upheld the above-mentioned regulation as “it had merely given the Commission procedural powers to grant exemption to specific categories of agreements and concerted practices.”⁵⁰¹

Italy based its request on three claims. First, it argued that Article 103 TFEU (then Article 87 EEC Treaty) had been infringed as the Regulation laid down provisions concerning the exemptions in Article 101(3) TFEU without having first defined the scope of the prohibition imposed by Article 101(1) TFEU. By defining the exception before having explicitly stated the rule to which the exception is applicable, the Regulation breached Article 103 and the principle according to which everything which is not prohibited is permitted. Secondly, the Italian Government submitted that the Regulation breached Article 101 TFEU and that there had been a misuse of powers. This was because the Regulation assumed that all the agreements coming within the exempted categories properly fall within the absolute prohibition in Article 101(1) TFEU. Finally, it was argued that Regulation 19/65 breached Article 103 TFEU, as it treated exclusive dealing agreements as falling under Article 101 and not under Article 102 TFEU (then Article 86 EEC Treaty) on the abuse of dominance position. According to the Italian government, Article 101 was only applicable to agreements between businesses acting on the same level (i.e. horizontal agreements). Agreements between businesses operating at successive levels (i.e. vertical agreements) could only be analysed

⁵⁰⁰ Judgment of 13 July 1966, *Italy v Council of the EEC and Commission of the EEC*, Case 32/65, EU:C:1966:42.

⁵⁰¹ See also Joanna Goyder and Albertina Albors-Llorens, *Goyder's EC competition law* (Oxford University Press 2009), 63.

under Article 102. By not respecting this, Regulation 19/65 had thus disregarded Articles 101 and 102 TFEU.

The CJEU did not accept the claims of the Italian Government and upheld the Regulation. It stressed that the Council had not enlarged the scope of Article 101 TFEU under Regulation 19/65. It had merely established the procedural rules for the Commission to grant exemptions under Article 101 (3) TFEU. The CJEU began by recalling the wording of Article 103(1): the Council “shall...adopt any appropriate regulation or directives to give effect to the principles set out in Articles [101] and [102].” The Court stated that the Council could “apply an exemption set out in Article [101](3) by means of a regulation if it thinks it fits.” However, the CJEU stressed that the Council was in a position to do so “without bringing about any alteration in the principles set out in Article [101](1).”⁵⁰²

As regards the second claim concerning the breach of Article 101 TFEU and misuse of powers, the Court stated that:

*“whilst it is true that to grant the benefit of Article [101](3) to a given agreement presupposes that this agreement falls within the prohibition imposed by Article [101](1), the authorization in Article [101](3) to grant this same benefit to categories of agreements does not imply that because a particular agreement comes within these categories it necessarily fits the description set out in Article [101](1).”*⁵⁰³

The CJEU pointed out that

*“to define a category is only to make a classification.” [Therefore], “to grant exemptions by categories cannot amount, even by implication, to passing any pre-conceived judgement on any agreement considered individually.”*⁵⁰⁴

The CJEU then concluded that the Regulation did not contravene these principles and that it did not “create any presumption of law concerning the interpretation to be given to Article

⁵⁰² Judgment of 13 July 1966, *Italy v Council of the EEC and Commission of the EEC*, Case 32/65, EU:C:1966:42. , at 404.

⁵⁰³ Ibid, at 405.

⁵⁰⁴ Ibid, at 406.

[101](1).”⁵⁰⁵ On these grounds, the CJEU concluded that the Regulation did not contravene Article 101 TFEU. Finally, the CJEU did also not accept the last argument of the Italian Government that the Council has misused powers as exclusive agreements fall within Article 102 TFEU and not Article 101 TFEU. The CJEU accepted the view of the Council, that the block exemption did not enlarge the scope of Article 101 TFEU:

*“neither the wording of Article 101 nor that of Article 102 justifies interpreting either of these Articles with reference to the level in the economy at which the undertakings carry on business. Neither of these provisions makes a distinction between businesses operating in competition with each other at the same level or between businesses not competing with each other and operating at different levels. It is not possible to make a distinction where the treaty does not make one.”*⁵⁰⁶

The CJEU upheld the Regulation because the Regulation did not create any presumption of illegality, nor did it include principles different to those already established in Articles 101 and 102 TFEU. It therefore did not change the scope of those Articles.

In subsequent cases, the CJEU has also held that parties to an agreement that does not satisfy the conditions laid down in a block exemption regulation may nevertheless argue that Article 101(3) TFEU applies on an individual basis.⁵⁰⁷ This is because the content of the exemptions is not determined by the implementing acts, but follows directly from Article 101(3) TFEU, that is self-executing. Moreover, it has also stated that when an agreement does not satisfy the terms of a block exemption regulation it is necessary to assess whether the individual agreement falls within Article 101 (1) TFEU and if so, whether it benefits from Article 101(3) TFEU.⁵⁰⁸ The mere fact that an agreement does not fall within a block exemption regulation

⁵⁰⁵ Ibid, at 406.

⁵⁰⁶ Ibid, at 407.

⁵⁰⁷ Judgment of 18 December 1986, *VAG France v Magne*, Case 10/86, EU:C:1986:502, paragraph 41.

⁵⁰⁸ E.g. Judgment of 30 April 1998, *Cabour and Nord Distribution Automobile v Arnor "SOCO"*, C-230/96, EU:C:1998:181, paragraphs 47; Judgment of 10 November 1993, *Petrogal v Correia, Simões & Companhia and Correia, Sousa & Crisóstomo*, C-39/92, EU:C:1993:874, paragraph 68.

does not create a presumption that the agreement is illegal.⁵⁰⁹ Therefore, the “non-compliance with a condition necessary for the exemption cannot, in itself, give rise to damages pursuant to Article 101 TFEU or oblige a supplier to accept an applicant distributor into a distribution system.”⁵¹⁰

The large margin of action which the CJEU recognises the Council is given under Article 103 TFEU is also coherent with the direct effect of Articles 101 and 102 TFEU. The CJEU considered that Article 103 TFEU does not place the Council under a duty to act. Under this provision the Court recognised that the Council had a great margin for action, notably “to decide whether a particular regulation is appropriate and it may come to such a decision on a given point without having to deal exhaustively with the whole of Articles [101] and [102].”⁵¹¹ It can decide what actions are to be taken and when.⁵¹² It does not need to deal with all the aspects of implementation of Articles 101 and 102 TFEU at the same time.⁵¹³ The Council can even differentiate its implementation measures depending on the economic sector and even within an economic sector. This is because the measures adopted under Article 103 TFEU do not determine the content of Articles 101 and 102 TFEU which are fully operative even in the absence of such provisions.⁵¹⁴

There is however an occasion when the EU legislator went beyond the mere procedural implementation of Articles 101 and 102 TFEU and enacted substantive competition principles, but it did so using its supplementary powers under Article 352 TFEU. According to this provision the EU may give itself the additional powers of action necessary for the

⁵⁰⁹ Judgment of 13 July 1966, *Italy v Council of the EEC and Commission of the EEC*, Case 32/65, EU:C:1966:42, paragraph 406.

⁵¹⁰ Judgment of 14 June 2012, *Auto 24*, C-158/11, EU:C:2012:351, paragraph 22.

⁵¹¹ Judgment of 13 July 1966, *Italy v Council of the EEC and Commission of the EEC*, Case 32/65, EU:C:1966:42, paragraph 404.

⁵¹² Judgment of 13 July 1966, *Italy v Council of the EEC and Commission of the EEC*, Case 32/65, EU:C:1966:42, paragraph 404.

⁵¹³ *Ibid.*

⁵¹⁴ Judgment of 6 April 1962, *De Geus en Uitdenboger v Bosch and others*, Case 13/61, EU:C:1962:11.

attainment of its objectives. This was the case with the first merger regulation, Regulation 4064/89⁵¹⁵, on the control of concentrations that was adopted under a double legal basis: Articles 87 and 235 EEC Treaty (now Articles 103 and 352 TFEU). This was because it covered situations which distorted competition but were not within the scope of Articles 101 and 102 of the Treaty. Unlike the ECSC Treaty, the Treaty of Rome did not establish specific rules for merger control,⁵¹⁶ and until 1989 when the first Merger Regulation was enacted, there were no general provisions allowing for a systematic merger control at EU level.⁵¹⁷ The CJEU upheld the Commission's view in *Continental Can*⁵¹⁸ that, in certain circumstances Article 102 TFEU could be used to prevent a dominant undertaking from abusing its dominant position by acquiring the competition and thereby reinforcing its dominant position. Article 101 TFEU has never been considered well suited for merger control. In *BAT*,⁵¹⁹ the CJEU, "contrarily to previously received wisdom,"⁵²⁰ confirmed that Article 101 TFEU could be applicable to the acquisition by an undertaking of a minority shareholding in another. However, as argued by

⁵¹⁵ Council Regulation (EEC) 4064/89 on the control of concentrations between undertakings [1989] OJ L 395/1 (hereinafter referred to as "the first Merger Regulation").

⁵¹⁶ Article 66(7) Treaty Constituting the Coal and Steel Community (ECSC Treaty).

If the High Authority finds that public or private undertakings which, in law or in fact, hold or acquire in the market for one of the products within its jurisdiction a dominant position shielding them against effective competition in a substantial part of the common market are using that position for purposes contrary to the objectives of this Treaty, it shall make to them such recommendations as may be appropriate to prevent the position from being so used. If these recommendations are not implemented satisfactorily within a reasonable time, the High Authority shall, by decisions taken in consultation with the government concerned, determine the prices and conditions of sale to be applied by the undertaking in question or draw up production or delivery programmes with which it must comply, subject to liability to the penalties provided for in Articles 58, 59 and 64.

⁵¹⁷ A first legislative proposal was adopted by the Commission in 1973, but did not get consensus at the Council to be approved. For an overview of the legislative history on merger control, see John C. Cook and Christopher S. Kerse, *EC Merger Control* (5th edn, Sweet & Maxwell 2009).

⁵¹⁸ Judgment of 21 February 1973, *DEPE - Europemballage Corporation and Continental Can Company v Commission*, Case 6/72, ECLI:EU:C:1973:22.

⁵¹⁹ Judgment of 17 November 1987, *BAT and Reynolds v Commission*, Joined cases 142 and 156/84, EU:C:1987:490.

⁵²⁰ Bellamy recalls that prior to *BAT* judgement, there had been no case in which Article 101(1) had been applied to an acquisition of shares, and that that "the law was widely thought to be accurately summarised in the Memorandum on concentrations of enterprises in the Common Market (1966), in which the Commission states that Article [101] (1) did not apply to an agreement which brought about a 'concentration' between undertakings. Christopher Bellamy, 'Mergers outside the scope of the new mergers regulation – implications of the Philip Morris judgement' in Barry E. Hawk (ed), *Fordham Corporate Law Institute* (1989), 22-1.

Bellamy, in the absence of specific provisions on merger control, there was little control over mergers and acquisitions under EU law, “unless, exceptionally, the transactions could be regarded as an abuse of dominance position contrarily to Article [102 TFEU] in accordance with *Continental Can*”⁵²¹ or caught under Article 101 TFEU in the very limited cases covered by the *BAT* judgement.⁵²² However, the framework provided by Articles 101 and 102 TFEU is limited and does not cover all the mergers that can distort competition in the internal market. “Only the strengthening of dominant position and not their creation can be controlled under Article [102 TFEU],”⁵²³ and *BAT* was limited to situations where the acquisition of a minority shareholding brings material influence short of control, or where there are arrangements for the commercial co-ordination of the policies of the company concerned.⁵²⁴ Therefore, when adopting the first Merger Regulation, the Council was clear on the need to base it “not only on Article [103] but, principally, on Article [352] of the Treaty.” (emphasis added) stating notably that:

“Whereas Articles [101] and [102], while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not, however, sufficient to cover all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty;

Whereas a new legal instrument should therefore be created in the form of a Regulation to permit effective monitoring of all concentrations from the point of view of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations;

Whereas this Regulation should therefore be based not only on Article [103] but, principally, on Article [352] of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also with regard to concentrations on the markets for agricultural products listed in Annex II to the Treaty;” (emphasis added)

⁵²¹ Ibid, 22-2.

⁵²² Ibid, 22-27.

⁵²³ Judgment of 25 March 1999, *Gencor v Commission*, T-102/96, EU:T:1999:65, paragraph 155.

⁵²⁴ Bellamy, 'Mergers outside the scope of the new mergers regulation – implications of the Philip Morris judgement', 22-27.

This was confirmed by the second merger regulation which was also enacted under the same double legal basis:

“Articles [101] and [102], while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article [103] but, principally, on Article [352] of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty.”

The Treaty of Lisbon establishes the exclusive competence of the EU to establish the competition rules necessary for the functioning of the internal market under Article 3(1)(b) TFEU. However, the direct effect of Article 101 and 102 TFEU remains unchanged, and so it does the correspondent limits to the Union’s powers under article 103 TFEU.

The relationship between EU law vested with direct effect and national laws is governed by the primacy principle

The relationship between EU laws that are directly applicable and national laws is determined by the primacy principle.⁵²⁵ This is particularly relevant for the exercise of the powers under Article 103(2)(e) TFEU must respect the primacy of EU competition law. Act adopted under Article 103(2)(e) TFEU cannot restrict or extend the reach of Articles 101 and 102 TFEU vis-à-vis national laws as that is determined by the principle of primacy. Therefore, the Council cannot, for example, use its implementing powers under Article 103 TFEU to establish a general rule according to which national laws prevail over EU competition laws, as that will go against the primacy principle. Also, it cannot be used to alter the scope of the primacy of EU competition law as interpreted by the CJEU, as that would amount to a change of the scope of Articles 101 and 102 TFEU. That would be the equivalent to the creation of

⁵²⁵ On the debate on whether supremacy is also applicable to EU measures that fail to satisfy the threshold for having direct effect see Dashwood and others, *Wyatt and Dashwood's European Union law*, 278-284.

new competition principles. Articles 101 and 102 TFEU are directly applicable, therefore their scope is not and cannot be determined by implementing acts.

The question that can then be asked is, what is the relevance and utility of Article 103(2)(e) TFEU?

The relevance of this provision in the early stage of the entry into force of the Treaty of Rome seemed to be quite limited. In the aftermath of *Walt Wilhelm*, which determined the parallel application of national and EU competition laws,⁵²⁶ the Parliament submitted a question for written answer by the Commission regarding the relationship between the EU competition provisions and national competition laws and the need to establish provisions under Article 103(2)(e) TFEU regarding that relationship.⁵²⁷

The Commission responded that there was no such need, as a rule already existed. It was the primacy principle as determined by the CJEU in *Walt Wilhelm*, and at that moment, that was enough.⁵²⁸ At that time, the Commission and the Member States held a discussion to assess measures to be taken under Article 101(2)(e) TFEU to prevent conflicts from arising.⁵²⁹ The Commission noticed that the Court's judgment in *Wilhelm* showed how conflicts could be avoided or overcome in practice, and that it was up to the Member States to decide which of the two alternatives to select:

“— In a case where a national decision regarding a restrictive practice would be incompatible with a decision adopted by the Commission upon the conclusion of proceedings initiated by it, the national authorities are required to respect the effects of the Commission decision.

⁵²⁶ Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4.

⁵²⁷ Question for written answer to the Commission No 433/69, by Mr. Vredeling, of the 22 January 1970. OJ N C28/4, 1970.

⁵²⁸ Answer by the Commission, of the 26 February 1976, to the question for written answer to the Commission No 433/69, by Mr. Vredeling. [1970] OJ N C28/4.

⁵²⁹ Third Report on Competition Policy, Annexed to the Seventh Report on Activities of the Communities, Brussels-Luxembourg, 1974, p. 19.

*— In cases in which, during national proceedings, it appears possible that the decision whereby the Commission will put an end to proceedings in progress concerning the same restrictive practice, may conflict with the effects of the decision of the national authorities, it is for the latter to take the appropriate measures*⁵³⁰

The Commission also observed that:

*“[s]o long as the national proceedings have not reached a final legal conclusion, it should not be too difficult to take account of a subsequent Commission decision. If, on the other hand, the decision of the national authority has already acquired legal force, there will be considerable difficulty in overcoming the conflict. It is for this reason that it would be desirable, where consultation with the Commission has not completely eliminated the danger of conflict, for national authorities to keep their proceedings open until the Commission has taken its decision”.*⁵³¹

As a result of the discussions, the Commission and the Member States concluded that it was not necessary to adopt a resolution pursuant to Article 103(2)(e) TFEU defining more precisely the relationship between the Community competition rules and the national legal provisions. Instead, they considered it more appropriate to improve the exchange of information between the relevant national authorities and the Commission, to proceed to mutual consultation where both EU and national competition laws apply, and generally to reduce the risks of conflict in individual cases by improving harmonization of national and Community policies on competition.

This situation seems to have changed with the reform of the enforcement regime in May 2004, with the entry into force of Regulation 1/2003. While under the regime implemented by Regulation 17/62, the Commission had a central role in the enforcement of Articles 101 and 102 TFEU and the role of the national competition authorities was secondary, Regulation 1/2003 changed this situation. National competition authorities are under the obligation to apply Articles 101 and 102 TFEU when they apply national competition laws to facts that

⁵³⁰ Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4, paragraphs 7 and 8.

⁵³¹ Forth Report on Competition Policy, Annexed to the Eight Report on Activities of the Communities, Brussels-Luxembourg, 1975, p. 19.

affect trade between Member States.⁵³² This means that, if this condition is fulfilled, every time a national competition authority opens an investigation under its national law, it must also open an investigation under EU law.

This preeminent role attributed to the national competition authorities may reinforce the need to determine the relationship between national and EU powers of investigation. This involves the determination of the relationship between national and EU enforcement procedures. It could be argued that we do not need Article 103(2)(e) TFEU for the EU to be able to do that. That results already from the principle of procedural autonomy. It is established case law as regards the obligation of the Member States to implement EU law that:

*“in so far as Community [now Union] law, including its general principles, does not include common rules, according to settled case-law, the national authorities when implementing Community [now Union] regulations must act in accordance with the procedural and substantive rules of their own national law. However, as the Court has held, recourse to rules of national law is possible only in so far as it is necessary for the implementation of provisions of Community [now Union] law and in so far as the application of those rules of national law does not jeopardise the scope and effectiveness of that Community [now Union] law, including its general principles”.*⁵³³

The reach of the principle of procedural autonomy only covers the enforcement of EU law, not the enforcement of national laws. This is of particular relevance when it comes the enforcement of EU competition rules by the national competition authorities as they enforce EU competition law in parallel with the enforcement of national competition laws.⁵³⁴ Under procedural EU rules a Member State can be required to stop an investigation of a potential breach of Articles 101 and 102 TFEU. However, EU procedural law cannot require Member

⁵³² Article 3(1) Regulation 1/2003.

⁵³³ Judgment of 9 October 2001, *Flemmer and Others*, Joined cases C-80/99, C-81/99 and C-82/99, EU:C:2001:525, paragraph 55, with references to Judgment of 6 May 1982, *BayWa v Bundesanstalt für landwirtschaftliche Marktordnung*, Joined cases 146, 192 and 193/81, EU:C:1982:146, paragraph 29 Judgment of 21 September 1983, *Deutsche Milchkontor GmbH*, Joined cases 205 to 215/82, EU:C:1983:233, paragraphs 17 and 22.

⁵³⁴ Article 104(1) TFEU and Article 3(1) Regulation 1/2003.

States to stop investigating the same facts under national laws. This is because EU procedural rules can only be applicable to the enforcement of EU law. Article 103(2)(e) TFEU however goes beyond what is established by the principle of procedural autonomy of the Member States. It allows the Council to determine the relationship between EU procedural rules applicable to the enforcement of EU competition provisions and the national procedural rules applicable to the enforcement of the national competition laws. Therefore, the Council is able, under Article 103(2)(e) TFEU to adopt a rule establishing that a national competition authority shall suspend its investigation under national competition law while the Commission investigates the same facts under Articles 101 and 102 TFEU, i.e. to establish a priority of the investigation at the EU level over the investigation of the same facts at national level under national competition laws. This is because the under Article 103(2)(e) TFEU the Council can determine the relationship between EU (procedural) law and national (procedural) laws.

EU action under Article 105(3) TFEU

This provision has been added by the Treaty of Lisbon. Under this provision the Commission may adopt regulations relating to the categories of agreements in respect of which the Council has adopted a Regulation or Directive pursuant to Article 103(2)(b) TFEU. As pointed out by Jones and Sufrin, before the inception of Article 105(3) TFEU, the Commission could only act following specific *ad hoc* Council regulations.⁵³⁵ The powers of the Commission under this provision are for the adoption of delegated acts. Such powers are limited to those delegated by the Council under Article 103(2)(b) TFEU. Consequently, under the principle of *nemo plus iuris transfere (ad alium) potest quam ipse habet*,⁵³⁶ the Council cannot delegate such types of powers to the Commission under Article 105(3) TFEU. Therefore, Article 105(3)

⁵³⁵ Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases & Materials* (6th edn, Oxford University Press), 107.

⁵³⁶ Latin maxim that means that “No one can transfer more rights (to another) than he himself has.”

TFEU does also not provide a legal basis for general legislative powers to establish substantive principles of EU competition law.

EU action under Article 106(3) TFEU

Under Article 106(3) TFEU,

“[t]he Commission shall ensure the application of the provisions of this Article and should, where necessary, address appropriate directives and decisions to the Member States.”

Craig argued that a relevant clarification introduced by Article 3(1)(b) TFEU has been that it brought under the exclusive competence of the EU the power to legislate on the relationship between public undertakings and competition rules in the overall functioning of the internal market.⁵³⁷ He claims that it is unclear whether competition rules that have an impact outside the “immediate area” of competition, such as Article 106 TFEU, would be under the exclusive competence of the EU together with Articles 101 and 102 TFEU. Craig submits that the “wording of Article 3(1)(b) TFEU is important in this respect. It determines that the EU has exclusive competence in establishing the competition rules necessary for the internal market.”⁵³⁸ According to Craig this indicates that the exclusive competence also attaches to Article 106(3) TFEU “given that this concerns the relationship between public undertakings and the competition rules in the overall functioning of the internal market.”⁵³⁹ Therefore, the exclusive competence under Article 3(1) TFEU “covers all competition rules relating to undertakings in the internal market, including as they apply within the context of Article 106 TFEU.”⁵⁴⁰ Craig does not state the consequences that follow from his conclusions. However, they are not difficult to identify. Article 106 TFEU addresses the application of competition rules and other rules of the Treaties to State measures in respect to public undertakings

⁵³⁷ See Craig, *The Lisbon Treaty, Law, Politics, and Treaty Reform*, 160-161.

⁵³⁸ *Ibid*, 161.

⁵³⁹ *Ibid*.

⁵⁴⁰ *Ibid*.

(Article 106(1) TFEU) and to undertakings granted special or exclusive rights or that are entrusted with services of general economic interest (Article 106(2) TFEU).⁵⁴¹

The CJEU held that Article 106(1) TFEU :

“[n]ecessarily implies that Member States may grant exclusive rights to certain undertakings and thereby granting them a monopoly.”⁵⁴²

When it comes to the Services of General Economic Interest [SGEI] under Article 106(2) TFEU, the CJEU had held that:

“Member States have a wide discretion to define what they regard as SGEIs and that the definition of such services by a Member State can be questioned by the Commission only in the event of manifest error.”⁵⁴³

Article 106(3) TFEU, as describes by Szyszczak is “an unusual provision” in the Treaty, as “it combines a supervisory element with a legislative element.”⁵⁴⁴ We have seen that when the EU has an exclusive competence, Member States can act only if authorised by the EU to do so. Taking this into consideration, it could follow from Craig’s conclusions that Member States could only decide on matters of choice between public and private ownership as well on the establishment of SGEI if authorised by the EU to do so, under the use of the legislative powers under Article 106(3) TFEU. This would mean a Copernic revolution on the role of sovereign States in national economies and provision of public services. The role States had in the reconstruction of the post-war Europe is well-documented. Szyszczak recalls that:

“At the time of the Treaty of Rome,[...] (1957), the state, directly or indirectly intervened in a large part of the national economy. Often goods were provided

⁵⁴¹ Jones and Sufrin, *EU Competition Law: Text, Cases & Materials*, 587.

⁵⁴² Judgment of 23 October 1997, *Commission v France*, C-159/94, EU:C:1997:501, paragraph 27.

⁵⁴³ Judgment of 12 February 2008, *BUPA and Others v Commission*, T-289/03, EU:T:2008:29, paragraph 166.

⁵⁴⁴ Erika M. Szyszczak, *The regulation of the State in competitive markets in the EU* (Hart 2007), 131. The supervisory element corresponds here to the power of the Commission to enforce Article 106 TFEU

*though state monopolies, in fields such as defense industries, energy and raw materials production.*⁵⁴⁵

The original Article 222 EC Treaty, now Article 345 TFEU, recognised the tolerance to State intervention in the market. It established that:

“The treaties shall in no way prejudice the rules in Member States governing the system of property ownership.”

It is a well-documented fact that there has been however, a changing role and nature of the State intervention in the market place since the foundation of the EEC in 1957.⁵⁴⁶ That change has been from the “fashion on nationalisation”⁵⁴⁷ towards an “increasing marketisation whereby Member States have turned to the market to provide services to the public, and the distinction between public and private providers has been partially eroded.”⁵⁴⁸ With the inception of Article 119 TFEU⁵⁴⁹ by the Treaty of Maastricht it is arguable that there is a preference for private over public undertakings. This provision determines that Member States shall conduct their economic policy *in accordance with the principle of an open market economy with free competition*.⁵⁵⁰ In this line, the approach of the CJEU to state monopolies has become quite rigorous during the 90’s requiring the economic preference of Member States to be subject to the principle of free competition.

⁵⁴⁵ Ibid, 1.

⁵⁴⁶ For a general view on the development of the law regarding exclusive rights and monopolies see Jose Luis Buendia Sierra, *Exclusive rights and state monopolies under EC law: Article 86 (formerly Article 90) of the EC Treaty* (Oxford University Press 2000); Marise Cremona, *Market integration and public services in the European Union* (Oxford University Press 2011); Wolf Sauter, *Public Services in EU Law* (Cambridge University Press 2014); Szyszczak, *The regulation of the State in competitive markets in the EU*.

⁵⁴⁷ Jones and Sufrin, *EU Competition Law: Text, Cases & Materials*, 588.

⁵⁴⁸ Ibid.

⁵⁴⁹ Ex-Article 4 EC.

⁵⁵⁰ Article 119 (1) TFEU

For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

Edward and Hoskins argue that it follows from the CJEU case law that “Member States have not retained complete sovereignty in relation to the creation of legal monopolies. Rather, the creation of such monopolies must be balanced with the principle of free competition.”⁵⁵¹

State intervention regarding State monopolies, exclusive rights and SGEI is motivated by what the Member States consider as “essential services” or “national interest”⁵⁵² and what is the best way to protect them. This is an area where the need for differentiation and diversity is recognised.⁵⁵³ In the words of Advocate General Jacobs in *Albany*,

*“Article [106](2) seeks to reconcile the Member States’ interest in using certain undertakings as an instrument of economic or social policy with the Community’s interest in ensuring compliance with the rules on competition and in the internal market.”*⁵⁵⁴ (References omitted)

An exclusive right of the EU to legislate on the relationship between EU competition rules and public undertakings under Article 106(3) TFEU would mean a loss of Member States’ competence to decide between public and private ownership balancing the public interest in any competition issues that may arise.

I argue however that Craig’s reasoning is flawed and that Craig’s conclusions on the scope of the exclusive competence under Article 3(1)(b) TFEU as determined by Article 106(3) TFEU seems to overlook two important considerations. Firstly, the powers of the Commission under Article 106(3) TFEU, including the power to enact directives, “*depends on the needs inherent in the duty of surveillance provided for in Article [106]*”.⁵⁵⁵ Secondly, an exclusive

⁵⁵¹ David Edward and Mark Hoskins, 'Article 90: deregulation and EC law, reflections arising from the XVI FIDE Conference' (1995) 1 Common Market Law Review , 160.

⁵⁵² Szyszczak, *The regulation of the State in competitive markets in the EU*, 1.

⁵⁵³ For example the Commission’s 2012 Communication on SGEI and state aid stated that:
Since the distinction between economic and non-economic services depends on political and economic specificities in a given Member State, it is not possible to draw up an exhaustive list of activities that a priori would never be economic. Such a list would not provide genuine legal certainty and would thus be of little use.

⁵⁵⁴ Judgment of 21 September 1999, *Albany*, C-67/96, EU:C:1999:430, paragraph 436.

⁵⁵⁵ *Ibid*, paragraph 14.

competence of the EU to legislate on the relation between EU competition provisions and the public undertakings and SGEI would be against a teleological interpretation of the Treaties. The Treaty of Lisbon merely reaffirmed the limits of the Commission powers under Article 106(3) TFEU.

The limited scope of the Commission's powers under Article 106(3) TFEU

The powers of the Commission under Article 106(3) TFEU, including the power to enact directives, “depends on the needs inherent in the duty of surveillance provided for in Article [106]”.⁵⁵⁶ The claim that Article 106(3) TFEU does not enable the Commission to determine the relationship between competition laws and public companies and SGEI may sound counter intuitive. The Commission was able, under Article 106(3) TFEU, to enact quite intrusive acts regarding Member States’ public monopolies. For example, the first directive enacted under this provision was the Transparency Directive.⁵⁵⁷ It imposed new obligations on the Member States among which was, for example, the duty of Member States to retain records for five years regarding public funds made available to public undertakings. After the confirmation of the legality of this directive by the CJEU, the Commission enacted two others under Article 106(3) TFEU. One directive concerned electronic terminal equipment - Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment.⁵⁵⁸ The other concerned electronic communications services – Commission Directive 90/388/EEC of 28 June 1990 on competition in the market for telecommunications services.⁵⁵⁹ Both directives were upheld by the CJEU and triggered the full liberalisation of the telecommunication networks and services by the end of the 90’s. The directives were upheld because, in both cases, the CJEU

⁵⁵⁶ Ibid, paragraph 14. The duty of surveillance is understood here as the enforcement of Article 106 TFEU.

⁵⁵⁷ Commission Directive (EEC) 80/723 on the transparency of financial relations between Member States and public undertakings [1980] OJ L 195/35.

⁵⁵⁸ Official Journal 1988 L 131, p. 73.

⁵⁵⁹ Official Journal 1990 L 192, p.10.

considered that exclusive rights were contrary to the free movement provisions and could be abolished as the Commission had supervisory powers over such rights under Article 106(3) TFEU. In *France, Italy and the UK v Commission*,⁵⁶⁰ the CJEU confirmed the validity of the above-mentioned Transparency Directive. However, the Court stressed that the powers to adopt directives “*depends on the needs inherent in the duty of surveillance provided for in Article [106]*”.⁵⁶¹ The UK government argued that the Commission had no power under Article 106(3) TFEU, to impose new obligations on the Member States.⁵⁶² On the opposite side, the Commission argued that one of its duties under Article 106(3) TFEU is to ensure that there is transparency in the relation between Member States and public undertakings. Therefore, it argued that it acted within the scope of its competence under Article 106(3) TFEU.

The CJEU upheld the Directive. However, this was not without stressing that Article 106(3) TFEU:

*“operates in a specific field of application and under conditions defined by reference to the particular objective of that Article. It follows that the Commission’s power to issue the contested directive depends on the needs inherent in its duty of surveillance provided for in Article [106] (...).”*⁵⁶³

Later, in *France v Commission*,⁵⁶⁴ regarding the validity of the Commission Directive on competition in the markets in telecommunications terminal equipment,⁵⁶⁵ the CJEU reaffirmed the limits of the Commission’s powers to enact directives under Article 106(3) TFEU.⁵⁶⁶ The French Government claimed that the Commission’s Directive restructured the policy on the telecommunications sector, and that such policy was within the scope of the

⁵⁶⁰Judgment of 6 July 1982, *France, Italy and United Kingdom v Commission*, Joined cases 188 to 190/80, EU:C:1982:257.

⁵⁶¹ Ibid, paragraph 14.

⁵⁶² Ibid, paragraph 5.

⁵⁶³ Ibid, paragraph 14.

⁵⁶⁴Judgment of 19 March 1991, *France v Commission*, C-202/88, EU:C:1991:120.

⁵⁶⁵ Official Journal 1988 L 131, p. 73.

⁵⁶⁶Judgment of 19 March 1991, *France v Commission*, C-202/88, EU:C:1991:120, paragraph 21.

sole competence of the Council under Article 114 TFEU. It also claimed that the directive conflicted with Article 103 TFEU as only the Council has the power to establish rules for the application of Articles 101 and 102 TFEU in specific sectors.⁵⁶⁷ The CJEU reaffirmed the limits of the Commission's power under Article 106(3) TFEU. The CJEU specifically stated that the powers under Article 106(3) TFEU are more restricted and precise than those under Article 114 and 103 TFEU, as regard subject matter and purpose.⁵⁶⁸ The CJEU held that Article 114 TFEU is concerned with "provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."⁵⁶⁹ Article 103 TFEU is concerned with the application of Articles 101 and 102 TFEU, therefore the competition rules applicable to all undertakings across all sectors. Article 106 TFEU is only concerned with public undertakings, or undertakings to which the States have granted special or exclusive rights and undertakings entrusted with the operation of services of general economic interest.⁵⁷⁰

*"It is only with regard to such measures that Article [106] imposes on the Commission a duty of supervision which may, where necessary, be exercised through the adoption of directives and decisions addressed to the Member States."*⁵⁷¹

Furthermore, the CJEU ruled that the elimination of a special right granted by the Member States can only be determined if it is shown to be incompatible with the provisions of the

⁵⁶⁷ Judgment of 19 March 1991, *France v Commission*, C-202/88, EU:C:1991:120, paragraphs 19-20.

⁵⁶⁸ *Ibid*, paragraph 23-26.

⁵⁶⁹ *Ibid.*, paragraph 24.

⁵⁷⁰ Under Article 2 of the Directive in question Member States which have granted special or exclusive rights to undertakings for the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment are to ensure that those rights are withdrawn and are to inform the Commission of the measures taken or draft legislation introduced to that end. Article 7 required Member States to take the necessary steps to make it possible for customers to terminate, with maximum notice of one year, leasing or maintenance contracts relating to terminal equipment which at the time of when the contracts were concluded were subject to exclusive or special rights granted to certain undertakings, Commission Directive 88/301/EEC on competition in the markets in telecommunications terminal equipment [1988] OJ L 131/73.

⁵⁷¹ Judgment of 19 March 1991, *France v Commission*, paragraph 24.

Treaty. Powers under Article 106(3) TFEU concerns State measures only, therefore anti-competitive conduct engaged in by undertakings action on their own initiative can only be called in question by means of individual decision under Articles 101 and 102 TFEU.⁵⁷² The CJEU considered the provisions of the Directive⁵⁷³ regarding the termination of special rights invalid as it went beyond the Commission's powers under Article 106(3) TFEU. The Commission failed to show in what respect the existence of such rights is contrary to the provisions of the Treaty.⁵⁷⁴ Consequently, the CJEU considered that Article 106(3) TFEU could not be used as a legal basis to regulate exclusive rights of undertakings or services of general economic interest.⁵⁷⁵ Article 106(3) TFEU concerns State Measures only. The anticompetitive effects of special rights or the provision of general economic interest must be dealt with by the Commission in an individual decision under Articles 101 and 102 TFEU.

This case is also underlines the limits to the Commission's powers under Article 106(3) TFEU that follow from the direct effect of the norm. The CJEU held that powers of the Commission under Article 106(3) TFEU include the possibility of specifying obligations arising under the Treaty. In *France v Commission*, the CJEU did make it clear that, under this provision, the Commission cannot determine the scope of the provisions with which the compliance is to be ensured, as "the extent of that power therefore depends on the scope of the rules with which compliance is to be ensured."⁵⁷⁶ It is not the role of the EU legislature to determine the scope of the rights and obligations under Article 106 TFEU. This was confirmed in *Spain and others v Commission*.⁵⁷⁷ The CJEU held that for the Commission to enact a directive under Article 106(3) TFEU, it must show that the conduct that it prohibits would be a violation of a

⁵⁷² Ibid.

⁵⁷³ Article 2 of the Directive 88/301/EEC on competition in the markets in telecommunications terminal equipment.

⁵⁷⁴ Judgment of 19 March 1991, *France v Commission*, paragraph 45.

⁵⁷⁵ Szyszczak, *The regulation of the State in competitive markets in the EU*, 136.

⁵⁷⁶ Judgment of 19 March 1991, *France v Commission*, C-202/88, EU:C:1991:120, paragraph 21.

⁵⁷⁷ Judgment of 17 November 1992, *Spain and others v Commission*, Joined cases C-271/90, C-281/90 and C-289/90, EU:C:1992:440.

directly applicable provision of the Treaty. It is not enough to show that it directly contributes to the general aim of then Article 3(f) EC Treaty.⁵⁷⁸ It is clear from the above-mentioned case-law⁵⁷⁹ that the power of the Commission to act under the “legislative element” of Article 106(3) TFEU is quite narrow. As argued by Szyszczak, “Article 106(3) TFEU does not allow the Commission to choose between various policy options.”⁵⁸⁰ Further, as pointed out by Ehlermann⁵⁸¹ and Van der Woude⁵⁸² Article 106 TFEU does not grant to the Commission a general control over the existence of special rights, but only the “assessment of ancillary restraints” that affect competition as the consequence of the existence of such rights. They can be exercised only to the extent that they are necessary for the supervisory power, i.e. it can only deal with conduct that it is a violation of a provision of the Treaty. Article 106(3) TFEU does not grant the Commission a general legal basis of a general legislative power. Directives under Article 106(3) TFEU cannot be enacted if the Commission fails to prove a breach under Article 106 TFEU. If there is no breach, the situation cannot be addressed in a directive under Article 106(3) TFEU. That would not be the exercise of a supervisory power. This may explain why the Commission took a different approach in the liberalisation of the energy sector. The liberalisation directives on the energy sector were enacted under Article 294 TFEU and not under Article 106(3) TFEU.⁵⁸³ Previous individual procedures against

⁵⁷⁸ In this sense see Szyszczak, *The regulation of the State in competitive markets in the EU*, 136.

⁵⁷⁹ It should be noted that the Treaty of Lisbon has no impact on the validity of the case law today. The Treaty of Lisbon did not change the direct effect of the Treaty’s provisions, or the scope of the powers of the EU under Article 106(3) TFEU. This is particularly clear if we take into consideration that, contrary to the Draft Treaty Establishing a Constitution for Europe (Draft Constitutional Treaty) of 2004, the Treaty of Lisbon left unchanged the wording of that provision.⁵⁷⁹ The classification of the nature of the competence of the EU as exclusive (or shared) after Lisbon, has no impact on the scope of the EU competence under Article 106 (3) TFEU that remained the same.

⁵⁸⁰ Szyszczak, *The regulation of the State in competitive markets in the EU*, 136.

⁵⁸¹ Clause-Dieter Ehlermann, 'Managing monopolies ; the role of the State in controlling market dominance in the European Community' (1993) 14 European Competition Law Review .

⁵⁸² Marc H. van der Woude, 'Article 90: "Competing for competence"' (1992) European Law Review ; Competition law checklist 1991 .

⁵⁸³ European Parliament and Council Directive (EC) 96/92 concerning common rules for the internal market in electricity [1997] OJ L 27/20 (legal basis Article 189b EEC Treaty); European Parliament and Council Directive (EC) 2003/54 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L 176/37; (legal basis Article 251 EC Treaty); European

France, Italy, Spain and The Netherlands⁵⁸⁴ in this sector were quashed by the CJEU. It considered *inter alia* that the Commission had failed to show that special and exclusive rights granted to electricity companies infringed Article 106(2) TFEU. Therefore, when later the Commission triggered legislative initiative to liberalise of the energy market across the EU, Article 106 (3) TFEU could not be used as a legal basis as a breach to Article 106 TFEU could not be found. This initiative would not be within its supervisory powers therein. Article 106(3) TFEU does not grant the Commission a general legislative power.

Furthermore, the CJEU has confirmed that the Council may, under Article 103 TFEU, deal with the implementation of Article 101 and 102 TFEU regarding public undertakings, undertakings granted special or exclusive rights and services of general economic interest.⁵⁸⁵ The powers of the Council under Article 103 TFEU are larger than the powers of the Commission under Article 106(3) TFEU.⁵⁸⁶ The former are not limited to the exercise of a supervisory role. However, Article 106 is directly applicable. Therefore, implementing acts of the Council under Article 103 TFEU do not and cannot determine the scope and content of Article 106(1) and (2) TFEU.⁵⁸⁷ Therefore, as neither Article 103, nor Article 106(3) TFEU enable the EU legislature to determine the lawfulness of a monopoly, special rights or SGEI with the EU competition rules, such power is not within the scope of the exclusive competence of the EU legislature under Article 3(1)(b) TFEU.

Parliament and Council Directive (EC) Directive 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L 211/55 (legal basis 251 EC Treaty).

⁵⁸⁴ Judgment of 23 October 1997, *Commission v France*, C-159/94, EU:C:1997:501; Judgment of 23 October 1997, *Commission v Italy*, C-158/94, EU:C:1997:500; Judgment of 23 October 1997, *Commission v Netherlands*, C-157/94, EU:C:1997:499; Judgment of 23 October 1997, *Commission v Spain*, C-160/94, EU:C:1997:502.

⁵⁸⁵ Judgment of 19 March 1991, *France v Commission*, C-202/88, EU:C:1991:120.

⁵⁸⁶ Ibid; Judgment of 6 July 1982, *France, Italy and United Kingdom v Commission*, Joined cases 188 to 190/80, EU:C:1982:257.

⁵⁸⁷ Judgment of 19 March 1991, *France v Commission*, C-202/88, EU:C:1991:120, would be relevant for the exercise of the powers of the Council under Article 103 TFEU.

The confirmation of the limited scope of Article 106(3) TFEU by the Treaty of Lisbon
An exclusive general legislative power of the Commission on competition matters within
Article 106 TFEU would be contrary to a teleological interpretation of the Treaty. On the one
hand the Treaty confirms the limited scope of the Commission's powers under Article 106(3)
TFEU. On the other hand, it also confirmed the role of the Member States regarding state
monopolies and the establishment of services of general economic interest.

As to the scope of the Commission's powers under Article 106(3) TFEU, its limited reach has
been confirmed under the Treaty of Lisbon. The Treaty did not retain the modifications
introduced to this provision by the Draft Constitutional Treaty. The Draft Constitutional
Treaty had changed this provisions to read as follows:

*"The Commission shall ensure the application of this Article and shall, where
necessary, adopt appropriate European regulations or decisions."*⁵⁸⁸

This wording introduced two relevant modifications that would have enlarged the powers of
the Commission under Article 106(3) TFEU. Firstly, the Commission could enact regulations
instead of directives. Directives, contrarily to Regulations, are considered a "milder form of
interference" with the Member State law.⁵⁸⁹ They are binding as to the result to be achieved,
but "leave the choice as to form and methods used to implement them to the discretion of
Member States."⁵⁹⁰ Regulations "are the most centralising of all Union instruments and are
used whenever there is a need for uniformity."⁵⁹¹ This would have given the Commission a
more direct control over Member States in this area. Furthermore, the Commission would
still be able to decide alone.⁵⁹² Article 106 TFEU does not require the involvement of any

⁵⁸⁸ Article III-166 of the Draft Constitutional Treaty.

⁵⁸⁹ See Arved Deringer, *The Competition Law of the European Economic Community* (Commerce Clearing House, Inc 1968), 183. Deringer argues that the Council should only apt to issue a regulation where it is impossible to accomplish the objective sought by a directive.

⁵⁹⁰ Chalmers, Davies and Monti, *European Union Law - Text and Materials*, 112.

⁵⁹¹ Ibid.

⁵⁹² This was the situation prior to the Treaty of Lisbon and has not been changed. In practice the Commission consults that EU Parliament and the Member States, but they do not have the opportunity to against the measure in the Council. This means that the Commission has the

other EU institution in the decision making process. Any chance of the Member States to influence the final result via their voting at the Council is excluded. The detailed framework ordinarily applicable to the adoption of a Regulation, which involves the other EU institutions as set down in Articles 289 to 297 TFEU, would not be applicable here. The Commission would not be inhibited by needing to consult with other institutions.⁵⁹³ Moreover, if it did consult, it would not be bound by their comments and opinions. It could have decided on the content of the Regulation alone and against the views of the Council and the Parliament that are institutions where Member States have a seat.

Secondly, the expression “directed to the Member States” was eliminated under the new wording of the provision. This would have given the Commission the power to direct decisions to undertakings and to enforce EU competition provisions outside the framework provided in Article 105 TFEU and Regulation 1/2003. Cooperation with the Member States within the ECN for the enforcement of EU competition rules to SGEI would be at risk. The Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities that established the rules for cooperation within the ECN, is applicable in the framework established by Regulation 1/2003. This regulation concerns the powers of the Commission within Article 105 TFEU and not those within Article 106(3) TFEU. These changes, however, did not make it into the Treaty of Lisbon. Article 106(3) TFEU remains the same. The constituent legislator of the Treaty of Lisbon rejected the reinforcement of the Commission’s powers under Article 106(3) TFEU.

opportunity to act even where there is no political consensus. See Jones and Sufrin, *EU Competition Law: Text, Cases & Materials*, 645.

⁵⁹³ In practice the Commission consults that EU Parliament and the Member States, but they do not have the opportunity to against the measure in the Council. This means that the Commission has the opportunity to act even where there is no political consensus. See *ibid*.

The principle of ownership neutrality and the discretion of Member States regarding SGEI

An exclusive general legislative power of the Commission on competition matters within

Article 106 TFEU would also be incompatible with a teleological interpretation of the Treaty.

Souter claims that the structure of the Treaties translate this diversity of approaches to

Member State intervention in the economy. He speaks about a

*“strategic compromise where the ‘liberal’ Member States obtained the four freedoms and the competition rules, and the ‘statist’ Member States obtained the exceptions to the above and special provisions for public enterprises, state monopolies and SGEI, although in practice all Member States rely on both set of rules.”*⁵⁹⁴

Article 106 is not the only provision which pertains to State Monopolies.⁵⁹⁵ *The Treaty of Lisbon left unchanged* Article 345 TFEU which establishes the principle of ownership neutrality. It also left unchanged Article 119 TFEU⁵⁹⁶ which requires compatibility of public ownership with competition in the market.

As argued by Jones and Suffrin, “[t]he answer to the question as to which, if any, areas of activity the normal principles of competition law should apply, belongs in the political rather than the legal realm.”⁵⁹⁷ An exclusive general legislative power of the Commission under Article 106(3) TFEU would mean that the decision for private or public ownership, balancing the public interest concerns and any competition issues that may arise would be on the exclusive hands of the Commission. This would be contrary to the principle of ownership neutrality, under Article 345 TFEU.

In respect of SGEI, there are also provisions other than Article 106 TFEU dealing with them.

Article 14 TFEU contains the general provision regarding SGEI. It states that:

⁵⁹⁴ Sauter, *Public Services in EU Law*, 115.

⁵⁹⁵ State Monopolies of commercial nature rare dealt with also by Article 37 TFEU, in the context of free movement of goods in the internal market.

⁵⁹⁶ Ex-Article 4 EC.

⁵⁹⁷ Jones and Suffrin, *EU Competition Law: Text, Cases & Materials*, 588.

“Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.”

Powers under Article 14 TFEU are shared, which is incompatible with an exclusive general legislative power of the EU under Article 106(3) TFEU. Further, the role of national law in the context of SGEI has been stressed by the Treaty of Lisbon, with the inclusion of Article 36 of the Charter of Fundamental Rights of the European Union and the Protocol (No 26) on services of general interest.

Under Article 36 of the Charter:

“The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.”

Protocol (No 26) on services of general interest confirms the discretion of national, regional and local authorities on the establishment of SGEI, which goes against an exclusive competence of the EU. Article 1 of this protocol states as follows:

“The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;*
- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;*

- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.”

An exclusive general legislative competence of the Commission to decide on the relation between competition rules with matters SGEI would be incompatible with Member States discretion in this area.

3. The nature of the competence to establish the substantive principles of EU competition law necessary the functioning of the internal market

We conclude from the previous section that Part III Title VII Chapter 1 TFEU contains no legal basis conferring a general legislative power to establish substantive principles of EU competition law. Therefore, such power is not within the exclusive competence of the EU under Article 3(1)(b) TFEU. We have seen that under the system of EU competences as introduced by the Treaty of Lisbon, if a competence is found in the Treaties and the Treaties do not provide otherwise, that competence is shared.⁵⁹⁸ Where a competence is not conferred upon the EU then that competence remains with the Member States.⁵⁹⁹ The question that must be asked is whether there is a legal basis in the Treaties that confers to the EU a general legislative power to establish substantive principles of EU competition law.

I argue that such legal basis exists and it is determined by Protocol (No 27) on the internal market and competition.

The conferral role of Protocol (No 27) on the internal market and competition and the enabling provision under Article 352 TFEU

Protocol (No 27) on the internal market and competition specifically indicates that:

“The High Contracting Parties,

⁵⁹⁸ Article 4(1) TFEU.

⁵⁹⁹ Article 4(1) TEU.

Considering that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted,

Have agreed that:

To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.”

Article 352 (1) TFEU establishes that:

“If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.”

The use of Article 352 TFEU to establish substantive principles of EU competition law without any express wording to that effect would be against the principle of conferral.⁶⁰⁰ As stated by the CJEU in Opinion 2/94:

“Article [352] is designed to fill the gap where no specific provision of the Treaty confers on the [EU] institutions express or implied powers to act, if such powers appear non the less to be necessary to enable the [EU] to carry out its functions with a view to attaining one of the objectives laid down by the Treaty. That provision being an integral part of an institutional system based on the principle of conferred powers cannot serve as a basis for widening the scope of [EU] power beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the [EU]. On any view, Article [352] cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.”⁶⁰¹

⁶⁰⁰ There are two other express constitutional limits to the use of Article 352 TFEU. First, under Article 352(2) TFEU measures adopted under Article 352 TFEU “shall not entail harmonisation of Member States’ laws or regulations in cases where the Treaties excludes such harmonisation.” Second, under Article 352(4) TFEU, measures under Article 352 TFEU “cannot serve as basis for attaining objectives pertaining to the common foreign and security policy.”

⁶⁰¹ Opinion of the Court of 28 March 1996, *Adhésion de la Communauté à la CEDH*, Opinion 2/94, EU:C:1996:140. paragraph 30.

Article 352 TFEU cannot be used to alter the overall scheme of competence as established under the Treaties. We have seen that the power to establish substantive principles of EU competition law is not within the scope of the EU competence under Article 3(1)(b) TFEU. Competence not conferred to the EU remains with the Member States.⁶⁰² Therefore, the use of Article 352 TFEU to adopt EU competition law without express wording to that effect, would “serve as a basis for widening the scope of [EU] power beyond the general framework created by the provisions of the Treaty as a whole.” That would be against the principle of conferral.⁶⁰³ Protocol (No 27) is primary law as per Article 51 TEU. It can make changes in the Treaties and in other provisions of primary law.⁶⁰⁴ As such, Protocol (No 27) is part of the general framework created by the Treaties regarding EU competences. It confers on the EU a shared competence in the area of competition policy that is not covered by the EU exclusive competence under Article 3(1)(b) TFEU . The use of Article 352 TFEU in the area of competition policy that is not covered by the EU exclusive competence under Article 3(1)(b) TFEU respects, therefore the principle of conferral.

On the (im)possibility of using Article 114 TFEU to adopt measures of approximation of national competition laws

The wording of Protocol (No 27) can take us to another question: whether Article 114 TFEU could also be used as a legal basis for measures of approximation of national competition laws.

Protocol (No 27) regards “the internal market and competition law.” It confirms that “that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted.” The Treaties “contain a ‘general’ provisions empowering the Union to adopt the ‘the measures of the approximation of the provisions

⁶⁰² Article 4(1) TEU.

⁶⁰³ Opinion of the Court of 28 March 1996, *Adhésion de la Communauté à la CEDH*, Opinion 2/94, EU:C:1996:140, paragraph 30.

⁶⁰⁴ Judgment of 27 June 2001, *Leroy and Others v Council*, Joined cases T-164/99, T-37/00 and T-38/00, EU:T:2001:170, paragraph 67.

laid down by law, regulation or administrative action in the Member States which have as their object the establishment and the functioning of the internal market' (Article 114(1) TFEU).⁶⁰⁵ In that light, it could be argued that Article 114 TFEU empowers the EU to adopt measures of approximation of national competition laws, if that is deemed necessary for the establishment and functioning of the internal market.

I do not agree with this conclusion, though. Firstly, I argue that to use Article 114 TFEU for that purpose would run against the principle of conferral. Secondly, I argue that the use of Article 114 TFEU to harmonise national competition laws would be excluded by the constitutional limits to the use of this provision.

The use of Article 114 TFEU to harmonise national competition laws is against the principle of conferral

In *Spain and Italy v Council*,⁶⁰⁶ the CJEU made it clear that rules which attach to the objectives set out in Article 26 TFEU, such as those adopted under Article 114 TFEU, are not competition rules necessary for the functioning of the internal market, even if they contribute to maintaining undistorted competition in the internal market.⁶⁰⁷ Therefore, Article 114 TFEU cannot be used as a legal basis for harmonising national competition rules. That would be against the system of competences as implemented by the Treaty of Lisbon and Article 114 TFEU would be transformed into an "instrument of general governance."⁶⁰⁸

The use of Article 114 TFEU to harmonise national competition laws is excluded by constitutional limits

Even if the CJEU had not excluded competition rules necessary for the functioning of the internal market from the scope of Article 26 TFEU and the use of Article 114 TFEU could be envisaged in the abstract, constitutional limits to the use of that provision would exclude its

⁶⁰⁵ Lenaerts and others, *European Union Law*, 117.

⁶⁰⁶ Judgment of 16 April 2013, *Spain and Italy v Council*, Joined cases C-274/11 and C-295/11, EU:C:2013:240.

⁶⁰⁷ Ibid, paragraph 22.

⁶⁰⁸ Derrick Wyatt, 'Community Competence to Regulate the Internal Market' (2007) Working Paper No 9/2007 University of Oxford Faculty of Law Legal Studies Research Paper Series 46.

use to harmonise national competition rules. The CJEU has reaffirmed the relevant constitutional limits to the use of Article 114 TFEU in the *Tobacco Advertising* case,⁶⁰⁹ even if sometimes those limits are more strictly enforced by the CJEU than other authorities.⁶¹⁰ The first limit is that EU law must harmonise national laws. EU legislation that left unchanged existing national laws cannot be regarded as aiming to unify national laws. The second relevant limit is that there must be an appreciable distortion of competition and that EU legislation shall contribute to the elimination of obstacles to free movement or distortions of competition.

As to the first limit to the use of Article 114 TFEU – that EU law must harmonise national laws – this has recently been confirmed by the CJEU in *European Parliament v Council of the EU*.⁶¹¹ This case concerned the challenge to Regulation 1435/2003 of 22 July 2003, on the Statute of a European Cooperative Society,⁶¹² by the EU Parliament on the grounds of the legal basis chosen by the Council. The “contested Regulation lays down a single statute applicable to the European cooperative society (SCE) in order, *inter alia*, to remove all barriers to cross-border cooperation of companies while taking account of the specific features of cooperatives.”⁶¹³ According to Recital 2 of the Regulation:

“The completion of the internal market and the improvement it brings about in the economic and social situation throughout the Community mean not only that barriers to trade should be removed, but also that the structures of production should be adapted to the Community dimension. For that purpose it is essential that companies of all types the business of which is not limited to satisfying purely local

⁶⁰⁹ Judgment of 5 October 2000, *Germany v Parliament and Council*, C-376/98, EU:C:2000:544.

⁶¹⁰ Case law up-holding the EU action under Article 114 TFEU includes, for example, Judgment of 13 July 1995, *Spain v Council*, C-350/92, EU:C:1995:237; Judgment of 9 October 2001, *Netherlands v Parliament and Council*, C-377/98, EU:C:2001:523; Judgment of 20 May 2003, *Österreichischer Rundfunk and Others*, Joined cases C-465/00, C-138/01 and C-139/01, ECLI:EU:C:2003:294; Judgment of 10 February 2009, *Ireland v Parliament and Council*, C-301/06, EU:C:2009:68; Judgment of 8 June 2010, *Vodafone and Others*, C-58/08, EU:C:2010:321.

⁶¹¹ Judgment of 2 May 2006, *Parliament v Council*, C-436/03, EU:C:2006:277, paragraph 44.

⁶¹² Regulation 1435/2003 of 22 July 2003, on the Statute of a European Cooperative Society [2003] OJ L207/1.

⁶¹³ Judgment of 2 May 2006, *Parliament v Council*, C-436/03, EU:C:2006:277, paragraph 2.

needs should be able to plan and carry out the reorganisation of their business on a Community scale.”

The Parliament asked the CJEU for the annulment of the Regulation on the grounds that it has been enacted under the wrong legal basis. According to the Parliament, Article 114 TFEU was applicable, and Article 352 TFEU was incorrectly applied.⁶¹⁴ The Parliament pointed out that the diversity of the various company laws of the Member States hinders the activities of cooperative societies, mostly as regards the transfer of their registered offices and cross-border mergers. As such there was a need to harmonise national laws. The Parliament was of the opinion that such harmonisation could be carried out under Article 114 TFEU by supplementing national law with European legal forms. In the case of the European Cooperative Society, the approximation of the laws of the Member States was necessary in order to create and manage cross-border cooperatives.⁶¹⁵ The Commission supported the Parliament in its claim and added a further argument. The contested regulation seeks to improve the conditions for the establishment of the internal market as it contributes to the removal of barriers to the free movement of services by introducing a legal form which allows the cooperative society to operate beyond national borders.⁶¹⁶ The Council argued that the contested regulation creates a new legal form, of a European dimension, additional to cooperative society under national law. It also considered that the fact that the EU act is aimed at establishing the functioning of the internal market is not sufficient to trigger the use of Article 114. According to the Council, approximation measures necessarily imply substitution of national laws.⁶¹⁷

The CJEU upheld the Regulation. It started by reaffirming that Article 114 TFEU empowers the EU legislator to adopt measures to improve the conditions for the establishment and

⁶¹⁴ Ibid, paragraphs 10-12.

⁶¹⁵ Ibid, paragraphs 19-22.

⁶¹⁶ Ibid, paragraph 28.

⁶¹⁷ Ibid, paragraphs 22, 29 and 30.

functioning of the internal market, and they must genuinely have that object, contributing to the elimination of obstacles to the economic freedoms guaranteed by the Treaty.⁶¹⁸ The CJEU also reaffirmed that recourse to Article 114 TFEU is possible to prevent the emergence of obstacles to trade resulting from heterogeneous developments of national laws.⁶¹⁹ The CJEU however considered that it was apparent from the content and purpose of the contested regulation that it aimed at introducing a new legal form in addition to the national forms of cooperative societies. The CJEU considered that in such circumstances the contested regulation cannot be regarded as aiming to approximate national laws already in existence but has as its purpose the creation of a new form of cooperative society in addition to the national forms.⁶²⁰

What are the consequences that result from this as to the possibility of enacting measures of approximation of competition laws under Article 114 TFEU?

First and foremost, it has been demonstrated in more detail that Member States did not transfer unlimited competence to the EU on competition matters. Member States retain exclusive competence on competition matters over their territory for situations that do not affect trade between Member States. As such, EU law cannot harmonise the national competition laws that fall under the exclusive competence of the Member States. The consequence of this is that EU competition law can only create new rights but it cannot replace national laws. Any EU legislation, even if it has the aim of improving the conditions for the establishment and functioning of the internal market, must leave the national laws under the scope of exclusive competence of the Member States intact. The merger regulation that creates the EU system for merger control is a good example of this and was correctly enacted under former Article 308 EC Treaty (now Article 352 TFEU). EU merger

⁶¹⁸ Ibid, paragraph 38.

⁶¹⁹ Ibid, paragraph 39.

⁶²⁰ Ibid, paragraphs 40-44. .

regulation coexists with national merger control. It could not replace national law in its entirety as the situations that do not affect trade between Member States are outside of EU jurisdiction. The national law applicable to restriction of competition that affects trade between Member States and that is applicable to situations that do not affect trade between Member States may well be the same. However, this is because that is the choice of the national legislator and not because the latter has been harmonised under Article 114 TFEU. The fact that the situations left outside the scope of EU law are purely national situations is irrelevant, as in *Österreichischer Rundfunk*, the CJEU considered that Article 114 TFEU could be used to harmonise situations that are purely national with no cross-border effects.⁶²¹ However, the limited scope of conferred powers in competition matters makes it impossible for the EU to harmonise the law that is within the scope of exclusive competence of the EU. Consequently, EU law cannot aim at approximating national laws but can only create new competition principles in addition to the national ones.⁶²² Therefore, an action under Article 114 TFEU is excluded.

As to the other limit – that there must be an appreciable distortion of competition and that the EU legislation shall contribute to the elimination of obstacles to free movement or distortions of competition - I also argue that harmonisation under Article 114 TFEU is set aside for competition matters as the EU legislature itself does not consider the existence of a harmonised law in the EU necessary. For the competence under Article 114 TFEU to be triggered it is not enough for there to be disparities between national laws. As stated by the CJEU in the *Tobacco Advertising* case:

“[i]f a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article [114] as legal

⁶²¹ Judgment of 20 May 2003, *Österreichischer Rundfunk and Others*, Joined cases C-465/00, C-138/01 and C-139/01, ECLI:EU:C:2003:294.

⁶²² Judgment of 2 May 2006, *Parliament v Council*, C-436/03, EU:C:2006:277, paragraphs 40-44. .

*basis, judicial review of compliance with the proper legal basis might be rendered nugatory.*⁶²³

Article 114 TFEU cannot be interpreted as meaning that the EU legislator may rely on that article with a view to eliminating the smallest distortions of competition. This would be incompatible with the principle of conferral.⁶²⁴ Article 114 does not therefore confer to the Union legislator a general power to regulate the internal market. Measures under Article 114 TFEU must be

*“intended to improve the conditions for the establishment and functioning of the internal market and must genuinely have that object, actually contributing to the elimination of obstacles to the free movement of goods or the freedom to provide services, or the removal of distortions of competition.”*⁶²⁵

It is hard to argue that harmonised national competition laws are necessary to create a level playing field in the internal market. Three main arguments support this statement. First, as confirmed by the CJEU, stricter national competition laws are not in conflict with EU competition law. Additionally, Regulation 1/2003 itself contradicts the need for harmonised national competition laws. Under Article 3(2) Regulation 1/2003 Member States can enact and apply stricter national competition laws regarding unilateral conduct. Finally, the CJEU considers that the Member States can have different approaches on the relevance of public policy considerations in the context of EU competition law. In such a context is difficult to argue that harmonised national competition laws are necessary to create a level playing field in the internal market.

The possibility of using Article 114 TFEU in the area of competition is therefore set aside.

⁶²³ Judgment of 5 October 2000, *Germany v Parliament and Council*, C-376/98, EU:C:2000:544, paragraph 84.

⁶²⁴ Ibid, paragraphs 107.

⁶²⁵ Judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 60; Judgment of 5 October 2000, *Germany v Parliament and Council*, C-376/98, EU:C:2000:544, paragraph 107.

Conclusion

This chapter established that the boundaries of the EU's exclusive competence under Article 3(1)(b) TFEU is determined by the legal provisions enabling the Union to exercise such competence. It concluded that the legal bases against which the scope of Article 3(1)(b) TFEU is to be found are Articles 103, 105(3) and 106(3) TFEU. The analysis of these provisions pursued in this chapter demonstrated that EU exclusive legislative competence to establish the competition rules necessary for the functioning of the internal market do not include the competence to establish substantive principles of EU competition law. Articles 101 and 102 TFEU are directly applicable. This has an impact on the scope of the powers of the Council under Article 103 TFEU to implement the substantive principles of those provisions whose content is ultimately determined by the CJEU. Therefore, the Council has no competence under Article 103 TFEU to establish substantive competition principles under Articles 101 and 102 TFEU. Accordingly, the Commission also cannot do it under Article 105(3) TFEU as it acts following a delegation of powers from the Council under Article 103 TFEU. As to the powers of the Commission under Article 106 TFEU, they are specifically limited to the situation where there is a violation of Article 106. Given the direct effect of Article 106 TFEU, it is the CJEU that determines the content of that Article and not the Commission. The Commission is limited in enforcing that provision only to the extent permitted by the interpretation of the CJEU. It has no powers to enact competition principles applicable to public undertakings and undertakings with special rights. Such competence has been conferred on the Union by Protocol (No 27) on the internal market and competition, which in turn provides for Article 252 TFEU as the legal basis for the Union to act. This has an important two-fold consequence. Firstly, the legislative competence to establish substantive principles of EU competition law is shared. The legislative action of the Member States in this area is not excluded by the exclusive competence of the EU under Article 3(1)(b) TFEU. Secondly, for an action to be taken under Article 352 TFEU unanimity in the Council is

required. As was showed in Chapter 2, unanimity strongly protects the accommodation of diversity in EU decision making process.

Reaching this stage of the thesis, the overall conclusion is that Article 3(1)(b) TFEU includes very little and excludes very much; it excludes more competence from its scope than what includes. The constitutional arrangements on competence allocation do not exclude the action of the Member States neither to enforce EU competition rules nor to establish substantive principle of EU competition law. Those competences remain shared under the Treaty of Lisbon.

In the light of these conclusions we will turn now in chapter 5 to the limits imposed by general principles of EU law to the capacity of the Member States to diverge from the Union in the field of EU competition law.

Chapter 5 – Limits to diversity resulting from the general principles of EU law of direct effect, primacy and ne bis in idem

Chapters 3 and 4 analyse the questions “(i) is the application of national competition law possible?”, “(ii) are Member States able to give their own interpretation of EU competition law even if it risks diverging from the approach favoured by the Commission?” from a point of view of the constitutional arrangements on competence allocation enshrined in the European Treaties. We arrived at a positive answer to these questions as Member States and the EU share competence to legislate on EU substantive competition principles and to enforce EU competition provisions. The existence of a shared competence was identified as a condition for diversity in EU competition law. Yet, the pursuit of the research question “Is diversity in EU competition law is possible from a constitutional point of view” is not complete without the analysis of a third question “(iii) how do the general principles of EU law limit diversity in EU competition law?” as these principles have the potential to affect the competence of the Member States. This is now analysed in Chapter 5.

This analysis is relevant as a plurality of decision-makers might lead to a conflict of laws or of interpretations of EU (competition) law. Two major general principles of EU law are relevant here: the principles of direct effect and primacy of EU law. Where the EU law is directly applicable in the legal order of the Member States it should prevail over conflicting national law. Due to the centripetal force of these principles in favour of the EU law over the national laws, the chances for diversity are generally seen as very limited, if not impossible. Weiler calls direct effect a “proxy for Governance,” as it entitles the legislative and administrative branches of the Union to reach individuals as objects and subjects of the laws, with no need

for the Member States to act as intermediaries.⁶²⁶ Some authors consider that diversity would be excluded by the direct effect of the EU competition provisions as no discretion in the implementation of self-executing norm is possible under *Van Gend en Loos* test,⁶²⁷ therefore, no different interpretation of EU competition law would be possible. Section 1 of this chapter discusses the impact of direct effect of EU competition provisions on diversity in EU law and why it does not exclude diversity in EU competition law.

Section 2 moves forward to discuss how the primacy of EU law over conflicting national laws affects diversity in EU competition law. Primacy of EU law requires national laws conflicting with EU law, including EU competition law, to be set aside. The relevant question here is when is national law inconsistent with a EU law? Constitutionalists refer to this question as the question of pre-emption. This section will explore the different theories of pre-emption identified in the literature and discuss their application by the CJEU in the field of EU competition law.

When enforcing EU law, Member States are bound by the fundamental rights of the European Union.⁶²⁸ Fundamental rights may have an impact on the way the EU and Member States' competence intertwine. Such is the case of the *ne bis in idem* principle, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union. *Grosso modo*, this principle determines that no one shall be tried or punished twice for the same crime. Session 3 of this chapter explores the application of the *ne bis in idem principle* in the context of the parallel enforcement of EU competition law, and discusses why a reading of the *ne bis in*

⁶²⁶ J.H.H. Weiler, 'Van Gend en Loos: The individual as subject and object and the dilemma of European legitimacy' (2014) 12 International Journal of Constitutional Law, 98.

⁶²⁷ W. van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 Common Market Law Review, 526; Okeoghene Odudu, 'Article 81(3), discretion and direct effect' (2002) 23 European Competition Law Review, 22.

⁶²⁸ Article 51 of the Charter of Fundamental Rights of the European Union.

idem principle as a limit to the parallel application of national and EU competition laws is contrary to the European Charter of Fundamental Rights..

1. Direct effect of EU Competition provisions

“We understand the principle of direct effect to be the capacity of Union law to produce independent legal effect within the national legal systems.”⁶²⁹ It “refers to the capacity of any provision of Union law, provided it satisfies certain threshold criteria, to create legal rights and/or obligations and/or powers which must be recognised and enforced within the domestic legal system.”⁶³⁰ It is generally recognised that *Van Gen den Loos* case gained its place in the EU legal history as “[e]ver since [...] it is clear that individuals may derive rights directly from Union (then Community) law.”⁶³¹ *Van Gen den Loos* is from 1963. The capacity of EU law to be applicable directly in the national legal orders had however been confirmed since 1962 as regards Article 101 and 102 TFEU. In *Bosch*,⁶³² the CJEU determined that parties to a contract could claim before a national court that their agreement was void under Article 101 (2) TFEU for breach of Article 101 (1) TFEU as that provision was fully applicable since the entry into force of the Treaty of Rome. The CJEU also confirmed the direct effect of Article 102 TFEU later in *BRT*⁶³³ and *Silver Line*.⁶³⁴ The CJEU stated that “in respect of abuse of a dominant position; such abuse is simply prohibited by the Treaty and it is for the competent national authorities or the Commission, as the case may be, to act on that prohibition within

⁶²⁹ Dashwood and others, *Wyatt and Dashwood's European Union law*, 235.

⁶³⁰ *Ibid*, 244.

⁶³¹ Lenaerts and others, *European Union Law*, 809.

⁶³² Judgment of 6 April 1962, *De Geus en Uitdenbogerd v Bosch and others*, Case 13/61, EU:C:1962:11.

⁶³³ Judgment of 27 March 1974, *BRT v SABAM*, Case 127/73, EU:C:1974:25.

⁶³⁴ Judgment of 11 April 1989, *Ahmed Saeed Flugreisen and Others v Zentrale zur Bekämpfung unlauteren Wettbewerbs*, Case 66/86, EU:C:1989:140.

the limits of their powers.”⁶³⁵ Therefore “[i]t must therefore be concluded that the prohibition laid down in Article 102 of the Treaty is fully applicable (...).”⁶³⁶

The birth of direct effect of Article 106 TFEU was more complex. The Article 106(1) TFEU provision is only applicable in conjunction with other provisions of the Treaty. The direct effect of this provision depends therefore from the direct effect of the rule the Member States have infringed. We have seen that Articles 101 and 102 are directly applicable. Therefore, nationals can claim before the national courts the violation of Article 106(1) TFEU if the measures adopted by a Member State do not comply with any one of those provisions.⁶³⁷

As to Article 106(2) TFEU, the CJEU started to exclude the direct effect of this provision. In *Muller*, 1971, the CJEU stated that: ⁶³⁸

*“The supervisory power conferred to the Commission includes the possibility of specifying, pursuant to Article [106](3), obligations arising under the Treaty. The extent of that power therefore depends on the scope of the rules with which compliance is to be ensured. Furthermore, the CJEU also considered that while Article [106] (3) of the Treaty empowers the Commission to specify in general terms the obligations arising under Article 106(1) by adopting directives, the Commission can also exercise that power to define in concrete terms the obligations imposed on the Member States under the Treaty”.*⁶³⁹

This ruling was repeated in 1983.⁶⁴⁰ The CJEU has later reviewed its position and in 1991, in *ERT* ruling the CJEU has specifically stated that:

⁶³⁵ Ibid, paragraph 32.

⁶³⁶ Ibid, paragraph 33.

⁶³⁷ In *Höfner and Elser v Macrotron*, a litigant succeeded to claim that Article 106(1) TFEU had been breached by a German law that lead to an infringement of Article 102 TFEU. Judgment of 23 April 1991, *Höfner and Elser v Macrotron*, Case 41/90, EU:C:1991:161.

⁶³⁸ Judgment of 14 July 1971, *Muller*, Case 10/71, EU:C:1971:85.

⁶³⁹ That power cannot however be used to make a finding that a Member State has failed to fulfil a particular obligation under the Treaty. The Directives cannot be interpreted as making direct findings towards a Member State. For that the Commission needs to use the procedure for taking an individual decision. *Id.*, para 17.

⁶⁴⁰ Judgment of 10 March 1983, *Fabricants raffineurs d'huile de graissage v Inter-Huiles*, Case 172/82, EU:C:1983:69.

*“it is for the national court to determine whether the practices of such an undertaking are compatible with Article [106] and to verify whether those practices, if they are contrary to that provision, may be justified by the needs of the particular task with which the undertaking may have been entrusted.”*⁶⁴¹

Jones and Sufrin break Article 106(2) TFEU in four questions: “is the undertaking ‘entrusted’ with a task?; is that task a ‘service of general economic interest’?; would the task be obstructed by complying with the Treaty rules?; and would a derogation from the Treaty rules have an effect on trade contrary to the interest of the Union?”⁶⁴²

They argue that, regarding the first two questions, the CJEU has consistently maintained that a national court may decide whether or not an undertaking has been entrusted with a service of general economic interest.⁶⁴³ As to the third question, they considered that, despite *Muller*, the CJEU has repeatedly confirmed that it is for the national courts to determine whether the application of competition rules would obstruct the undertaking’s tasks and that therefore, also this part of Article 106(2) TFEU has direct effect. They argue however, that the fourth question is more problematic, as it requires the assessment of whether the interest of the EU would be adversely affected. They consider that a decision by the Commission on this aspect would be better suited than a decision of a national court.

Against this view Buendia Sierra argues that this is not a fourth requirement but rather part of the proportionality test to which the first sentence of Article 106(2) TFEU is subject.⁶⁴⁴

I consider that realistically, whether the “EU interest” is an autonomous requirement or part of the proportionality test is of little relevance if the Commission was the only entity capable of doing such assessment. If only the Commission was able to determine whether the

⁶⁴¹ Judgment of 18 June 1991, *ERT v DEP*, Case 260/89, EU:C:1991:254, paragraph 34.

⁶⁴² Jones and Sufrin, *EU Competition Law: Text, Cases & Materials*, 643-44.

⁶⁴³ Judgment of 27 March 1974, *BRT v SABAM*, Case 127/73, EU:C:1974:25.

⁶⁴⁴ José Luis Buendia Sierra, 'Article 106 - Exclusive or Special Rights and Other Anti-Competitive State Measures' in Jonathan Faull and Ali Nikpay (eds), *Faull and Nikpay: The EU Law of Competition* (3rd edn, Oxford University Press 2014), 6.214.

interest of the Union was at stake, it would be the only authority with jurisdiction to say whether the grant of an exclusive right is lawful under Article 106(2) TFEU. The Commission seems to consider that this is the case and that is the only authority with jurisdiction to determine whether the exception under Article 106(2) applies.⁶⁴⁵ I do not agree, and argue that the CJEU however, has contradicted this interpretation of the Commission, confirming the direct effect of Article 106(2) TFEU.⁶⁴⁶ In *BRT* the CJEU recognised the direct effect of Article 106(2) TFEU. In this case the question of positive action by the national court under Article 106(2) TFEU, i.e. the grant of an exception thereof, was however not at stake. The CJEU considered that an undertaking to which the state has not assigned any task and which manages private interests, including intellectual property rights protected by law, is not covered by Article 106(2) TFEU.⁶⁴⁷ However, in *Silver Line*,⁶⁴⁸ as argued by Van der Woude, the CJEU developed the jurisprudence in *BRT* to include positive action by national authorities and national courts.⁶⁴⁹ The CJEU considered that Article 106(2) TFEU can be applicable to air carriers who are obliged by the public authorities to operate on routes that are not commercially viable but that must operate for reasons related to general public interest. For that, national authorities responsible for the approval of tariffs and the national courts deciding on any dispute related to the tariffs, must be able to determine the exact

⁶⁴⁵ In the same sense see, Woude, 'Article 90: "Competing for competence"', 78. The Commission took this view on the Guidelines on the application of competition rules in the telecommunications sector where the Commission states that it "infers from the case law of the Court of Justice [Judgment of 14 July 1971, *Muller*, Case 10/71, EU:C:1971:85; Judgment of 11 April 1989, *Ahmed Saeed Flugreisen and Others v Zentrale zur Bekämpfung unlauteren Wettbewerbs*, C-66/86, EU:C:1989:140] that it has exclusive competence, under the control of the Court, to decide that the exception of Article [106] (2) applies. The national authorities including judicial authorities can assess that this exception does not apply, when they find that the competition rules clearly do not obstruct the performance of the task of general economic interest assigned to undertakings. When those authorities cannot make a clear assessment in this sense they should suspend their decision in order to enable the Commission to find that the conditions for the application of that provision are fulfilled." Commission Guidelines on the application of EEC competition rules in the telecommunications sector [1991] OJ C233/02.

⁶⁴⁶ In the same sense see van der Woude, *ibid*.

⁶⁴⁷ Judgment of 27 March 1974, *BRT v SABAM*, Case 127/73, EU:C:1974:25.

⁶⁴⁸ Judgment of 11 April 1989, *Ahmed Saeed Flugreisen and Others v Zentrale zur Bekämpfung unlauteren Wettbewerbs*, Case 66/86, EU:C:1989:140.

⁶⁴⁹ Woude, 'Article 90: "Competing for competence"', 78.

nature of the needs in question and the impact in the structure of the tariffs applied to the airlines.⁶⁵⁰ Later, in *ERT*, the CJEU was particularly clear on the possibility of Member States granting exceptions under Article 106(2) TFEU, stating that:

“33 (...) it should be observed that, according to Article [106] (2) of the Treaty, undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition so long as it is not shown that the application of those rules is incompatible with the performance of their particular task (...).

*34 Accordingly it is for the national court to determine whether the practices of such an undertaking are compatible with Article [102] and to verify whether those practices, if they are contrary to that provision, may be justified by the needs of the particular task with which the undertaking may have been entrusted.”*⁶⁵¹

The CJEU reconfirmed the direct effect of 106(2) TFEU in *Técnicos Oficiais de Contas*.⁶⁵²

This case concerned a preliminary ruling by the *Tribunal da Relação de Lisboa* regarding, *inter alia*, the compatibility with Article 101 TFEU of the Training Credits Regulation enacted by the national professional association of accountants. This Regulation put in place a system of compulsory training for chartered accountants in order to guarantee the quality of their services. This training was divided between institutional and professional training, and the institutional training was reserved exclusively to the professional association. The Portuguese competition authority had found that such division of the training market was incompatible with Article 101 TFEU. The professional association appealed the decision and argued, *inter alia*, that it has a public service mission derived directly from the law, as such its activities were outside the scope of Article 101 TFEU. In addition, it claimed that the creation of a system of compulsory training for chartered accountants is a service of general economic interest within the meaning of Article 106(2) TFEU.⁶⁵³

⁶⁵⁰ Judgment of 11 April 1989, *Ahmed Saeed Flugreisen and Others v Zentrale zur Bekämpfung unlauteren Wettbewerbs*, Case 66/86, EU:C:1989:140, paragraph 56.

⁶⁵¹ Judgment of 18 June 1991, *ERT v DEP*, Case 260/89, EU:C:1991:254.

⁶⁵² Judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127.

⁶⁵³ *Ibid*, paragraph 28.

The CJEU, reaffirming previous jurisprudence, expressly confirmed the direct effect of Article 106(2), stating that:

*“106 (...), undertakings falling within the scope of Article 106(2) TFEU may rely on that provision of the Treaty to justify a measure contrary to Article 101 TFEU only if the restrictions on competition, or even the exclusion of all competition, are necessary in order to ensure the performance of the particular tasks assigned to them.”*⁶⁵⁴

The CJEU was of the view, however, that regulations such as the one at stake constitute a restriction on competition, as prohibited under Article 101 TFEU. The capacity of Article 106(1) and (2) TFEU to have direct effect unquestionably ended up by being confirmed by the CJEU.

Diversity is not anathema to the direct effect of EU (competition) law

Some authors claim that direct effect precludes diverse outcomes in EU law enforcement. *Van Gerven* argues that in relation to rights which EU law confers on individuals, the answer must necessarily be that their content should be the same throughout the EU.⁶⁵⁵ This would jeopardize any chance of diversity in the enforcement of EU law directly applicable in the Member States.

In the same sense, Oduu argues that the direct effect test under *Van Gen den Loos* was motivated by the aim of promoting uniformity in application in all Member States.⁶⁵⁶ It excludes discretion as to the content of the norms. In this light, he argues that Article 101(3) TFEU “involves so much discretion that a centralised system of enforcement⁶⁵⁷ was the only

⁶⁵⁴ The CJEU quoted Judgment of 25 June 1998, *Chemische Afvalstoffen Dusseldorp and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*, C-203/96, EU:C:1998:316, paragraph 65; Judgment of 19 May 1993, *Corbeau*, C-320/91, EU:C:1993:198, paragraph 14 and Judgment of 27 April 1994, *Gemeente Almelo and Others v Energiebedrijf IJsselmij*, C-393/92, EU:C:1994:171. See Judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, para 106.

⁶⁵⁵ Gerven, 'Of Rights, Remedies and Procedures', 526.

⁶⁵⁶ Oduu, 'Article 81(3), discretion and direct effect', 22.

⁶⁵⁷ Oduu is referring to Article 9(1) Regulation 17/62.

way to ensure a consistent interpretation.”⁶⁵⁸ These claims for uniformity are based on the genesis of the test developed in *Van Gend en Loos*. It is commonly accepted that it follows from *Van Gend En Loos* that “[t]he decisive test for determining whether or not a given provision has direct effect is its content.”⁶⁵⁹ Under the *Van Gend En Loos*’ test a provision needs to be “clear, negative, unconditional, containing no reservation on the part of the Member States, and not dependent on any national implementing measures.”⁶⁶⁰ Even if this test has been said to have suffered an “undeniable dilution over the years,”⁶⁶¹ as today a norm is considered to have direct effect if “sufficiently operational in itself to be applied by a court,”⁶⁶² Lenaerts and Van Nuffel point out however that “[t]hough the Court has not invariably formulated that test in the same way, it refers to a provision which is sufficiently precise (“clear”) and requires no further implementation (involving a margin of discretion) by Union or national authorities in order to achieve the effect sought in an effective manner (“unconditional”).⁶⁶³

I do not agree with the conclusion that diversity is excluded by the direct effect character of the EU competition law provisions. I base my reasoning in four major arguments. Firstly, it is misleading to analyse direct effect of articles 101 and 102 TFEU on the grounds of *Van Gen en Loos*. Secondly, uniformity in the implementation of Articles 101 and 102 TFEU could not be aimed by the CJEU at the time it confirmed their direct effect. Thirdly, direct effect allows some discretion in EU competition law enforcement. Finally, diversity is not incompatible

⁶⁵⁸ Odudu, 'Article 81(3), discretion and direct effect'.

⁶⁵⁹ Lenaerts and others, *European Union Law*, 810.

⁶⁶⁰ Judgment of 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, Case 26/62, EU:C:1963:1.

⁶⁶¹ Bruno de Witte, 'Direct effect, supremacy and the nature of legal order' in Paul; de Búrca Craig, Gráinne (ed), *The evolution of EU law* (2nd edn, Oxford University Press 2011), 332.

⁶⁶² Opinion of Advocate General Van Gerven of 27 October 1993, *Banks v British Coal*, C-128/92, EU:C:1993:860, paragraph 27.

⁶⁶³ Lenaerts and others, *European Union Law* referring to the Opinion of Advocate General Van Gerven of 27 October 1993, *Banks v British Coal*, C-128/92.

with justiciability of EU law directly applicable. Therefore, direct effect allows diversity even when it does not allow discretion.

Direct effect of Articles 101 and 102 TFEU has not its genesis on *Van Gend en Loos* test

The arguments against diversity of EU law directly applicable in the Member States are grounded on the *Van Gen den Loos* test that has the content of the norms at its core. I argue however, that the genesis of direct effect of Articles 101 and 102 TFEU is distinct and it is not inferred from the content of these provisions. Therefore, the argument that it follows from *Van Gend en Loos* test that the enforcement of Articles 101 and 102 TFEU must be uniform, falls.

The different genesis of direct effect can be observed if we do a chronological and comparative readings of the CJEU approach to direct effect of EU law in *Bosch* and *Van Gend en Loos*. This observation is then confirmed by the approach of the CJEU to the direct effect of the competition provisions under the European Coal and Steel Community Treaty,⁶⁶⁴ in *Banks*.⁶⁶⁵

Chronologically, *Bosch* precedes *Van Gend en Loos*. The former dates from 1962, the later from 1963. So, it cannot be said that *Bosch* reads from *Van Gend en Loos*. Also the CJEU has not changed its approach or mentioned *Van Gend en Loos* in subsequent cases dealing with direct effect of Articles 101 and 102 TFEU.⁶⁶⁶

This chronologic observation *per si* is of little significance if the CJEU approach in both cases had been the same. However, a comparative reading of the cases shows it was not.

⁶⁶⁴ Treaty Establishing the European Coal and Steel Community, April 18, 1951, entered into force 23 July 1952, expired on 23 July 2002.

⁶⁶⁵ Opinion of Advocate General Van Gerven of 27 October 1993, *Banks v British Coal*, C-128/92, EU:C:1993:860.

⁶⁶⁶ E.g. See Judgment of 30 April 1974, *Sacchi*, Case 155/73, EU:C:1974:40, paragraph 431 and Judgment of 11 April 1989, *Ahmed Saeed Flugreisen and Others v Zentrale zur Bekämpfung unlauteren Wettbewerbs*, Case 66/86, EU:C:1989:140, paragraph 32.

Bosch and *Van Gend en Loos* have the same constitutional background, which make them particularly suitable for comparison, as there is no specific context of the referring jurisdiction that could explain the difference in the CJEU approaches. They were both referrals from Dutch Courts. The Netherlands is a Member State with a constitutional monist tradition when it comes to the effect of international treaties in its legal order. Unlike the Member States with a dualist tradition, in the Netherlands the provisions of international treaties do not need to be incorporated by a provision of national law to become part of the national legal system, as long as the provisions according to their terms are self-executing. Under Article 65 of the Dutch constitution at that time, “Provisions of agreements which, according to their terms, can be binding on anyone shall have such binding force after having been published.” Article 66 of that Constitution established that “Legislation in force with the Kingdom shall not apply if this application would be incompatible with provisions of agreements which are binding upon anyone and which have been entered into force before or after the enactment of such legislation.”⁶⁶⁷ In both cases the underlying issue was to understand whether the provisions at stake – i.e. Article 101 TFEU (then Article 85 EEC Treaty), in *Bosch* and Article 30 TFEU (then Article 12 EEC Treaty), in *Van Gend en Loos* - could be considered self-executing. As stated by the Dutch Supreme Court in the order accepting the reference in *Bosch* to be done by The Hague Court of Appeal: “as is clear from Article 66 [of the Dutch constitution], the question of whether a provision of a Treaty binds the nationals of the Member States is, at least in Dutch law, a question that can only be answered on the basis of the interpretation of those treaty provisions.” Therefore, the Dutch Supreme Court considered *Bosch* was on a question of the Treaty’s interpretation, it was a good question to refer to the CJEU.⁶⁶⁸ The received wisdom was that the self-executing nature of treaty provisions had to be deduced from the intention of the contracting

⁶⁶⁷ Translated provided by de Witte, 'Direct effect, supremacy and the nature of legal order'.

⁶⁶⁸ Ibid, 332.

parties.⁶⁶⁹ As I will show next, as regards Articles 101 and 102 TFEU the CJEU had an easy way out to show the intent of the parties on the self-executing nature of these provisions without needing to get into their content.

Bosch was a preliminary ruling concerning the validity of an agreement under Article 101(2) TFEU after the entry into force of the Treaty of Rome.⁶⁷⁰ The reference to the CJEU was made in a case concerning an appeal against the decision of a court in Rotterdam regarding the validity under Article 101 TFEU, of an exclusive agreement between Robert Bosch GmbH, a German manufacture of electrical devices, and its distributor for the national market, the company Van Rijn. In the proceedings, the defendant claimed that the exclusive agreement breached Article 101(1) and it was void under Article 101(2). The court in Rotterdam rejected that claim and considered that Article 101 would only be enforceable once the common market had been achieved, i.e. at the end of the transitory period.⁶⁷¹ The decision was appealed to the Court of Appeal in The Hague which made a preliminary reference to the CJEU asking:

*"[w]hether the prohibition on export imposed by Robert Bosch GmbH of Stuttgart, on its customers and accepted by them by way of contract, is void by virtue of Article [101] (2) of the TFEU as far as exports to The Netherlands are concerned."*⁶⁷²

The CJEU peremptorily considered that:

*The answer to this question must in principle be in the affirmative.*⁶⁷³

⁶⁶⁹ Ibid.

⁶⁷⁰ Judgment of 6 April 1962, *De Geus en Uitdenboger v Bosch and others*, Case 13/61, EU:C:1962:11, paragraph 51.

⁶⁷¹ Foreseen in Article 8 of the EEC Treaty.

⁶⁷² Judgment of 6 April 1962, *De Geus en Uitdenboger v Bosch and others*, Case 13/61, EU:C:1962:11.

⁶⁷³ Ibid, at 51.

This is because:

“Articles [104] and [105] of the treaty, which confer powers on the national authorities and on the commission respectively for the application of article [101], presuppose its applicability from the time of entry into force of the treaty.”⁶⁷⁴

Under Article 104 TFEU:

“Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.”

Under Article 105 (1) TFEU:

“Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.”

One year after *Bosch*, in *Van Gend en Loos*, the CJEU was questioned on the direct effect of Article 30 TFEU also by a Dutch Court, the *Tariefcommissie*, an administrative specialised court.⁶⁷⁵ The *Tariefcommissie* referred a question to the CJEU in the context of a dispute about an import tax:

⁶⁷⁴ Ibid.

⁶⁷⁵ The CJEU received strong opposition from some Member States, including from The Netherlands, regarding the competence of the CJEU to decide on the matter. The Government of The Netherlands challenged the jurisdiction of the CJEU “on the ground that the reference relates not to the interpretation but to the application of the Treaty in the context of the constitutional law of the Netherlands,” and that was something to be decided by the Dutch courts and authorities according to their constitutional law. The CJEU, however, did not agree and concluded that it had competence to determine the scope of Article 30 TFEU within the context of the EU law and with reference to the individuals.

“Whether Article [30 TFEU] has direct application within the territory of a member state, in other words, whether nationals of such a state can, on the basis of the article in question, lay claim to individual rights which the courts must protect.”⁶⁷⁶

In order to assess whether Article 30 TFEU was self-executing, the CJEU did not try to reconstruct the intent of the contracting parties to the Treaty.⁶⁷⁷ Instead the CJEU held that:

“[t]o ascertain whether the provisions of an international treaty extend so far their effects it is necessary to consider the spirit, the general scheme and the wording of its provisions.”⁶⁷⁸

It then inferred from the special nature of the Community legal order that:

“Community law therefore not only imposes the obligations on individuals but it also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.”⁶⁷⁹

The CJEU then sought to get into the content of Article 30 TFEU to understand whether it imposed “a clearly defined” obligation as the right was not “expressly granted by the Treaty.”

The CJEU concluded that:

“[t]he wording of Article [30 TFEU] contains a clear and unconditional prohibition which is not a positive but negative obligation. The obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes ideally adapted to produce direct effect in the legal relationship between Member States and their subjects.”⁶⁸⁰

⁶⁷⁶ Judgment of 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, Case 26/62, EU:C:1963:1, paragraph 6.

⁶⁷⁷ de Witte, 'Direct effect, supremacy and the nature of legal order', 327.

⁶⁷⁸ Judgment of 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, Case 26/62, EU:C:1963:1, paragraph 12.

⁶⁷⁹ Ibid.

⁶⁸⁰ Ibid, at 13.

Bosch and Van Gend en Loos concerned the same type of question: the self-executing nature of Treaty's provisions. Article 101 TFEU and Article 30 TFEU respectively. The approach of the CJEU to the question however, was different.

In *Bosch* the CJEU was able to infer the self-executing nature of Articles 101 and 102 TFEU from the overall scheme of the Treaty. Article 104, together with Article 105 TFEU, required Articles 101 and 102 TFEU to be enforced from the entry into force of the Treaty of Rome, irrespective of whether implementing measures had been adopted. Under Article 104 TFEU the parties expressed their clear intent to apply Articles 101 and 102 TFEU since the entry into force of the Treaty. In *Van Gend en Loos*, the analysis regarding the self-executing nature of Article 30 TFEU required a different type of approach. There was no equivalent provision to Article 104 TFEU in the context of the Customs Union, from which the CJEU could infer the intent of the contracting parties to be bound by Article 30 TFEU, since the entry into force of the Treaty, irrespective of implementing measures. The CJEU needed to infer the self-executing nature of this provision from "the spirit, the general scheme and the wording of its provisions."⁶⁸¹ The content of the provision was central to the matter as it was the element which determined the self-executing nature of Article 30 TFEU.

The approach of the CJEU in *Banks*,⁶⁸² concerning the direct effect of the competition provisions of ECSC Treaty, confirms the distinct approach of the CJEU in *Bosch*. In *Banks*, the CJEU followed the *Van Gen den Loos* test. Despite the similar content of the ECSC Treaty competition provisions with Articles 101 and 102 TFEU, the CJEU arrived at a distinct conclusion on their direct effect.⁶⁸³

⁶⁸¹ Judgment of 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, Case 26/62, EU:C:1963:1, paragraph 12.

⁶⁸² Judgment of 13 April 1994, *Banks v British Coal*, C-128/92, EU:C:1994:130.

⁶⁸³ *Banks* alleged *inter alia* breach of Articles 4(d), 60, 65 and 66(7) of the ECSC Treaty. Under Article 4(d) ECSC contained a prohibition against discrimination between producers, purchasers or consumers within the common market for coal and steel. Article 60 of the ECSC Treaty prohibited unfair competitive prices. Article 60 of the ECSC Treaty corresponded to Article 101 TFEU, and

The comparative analysis of *Bosch* and *Van Gen den Loos* shows that direct effect of Articles 101 and 102 TFEU was affirmed by the CJEU because “Articles [104] and [105] of the treaty, (...), presuppose its applicability from the time of entry into force of the treaty,”⁶⁸⁴ and not because they contain “a clear and unconditional prohibition which is not a positive but negative obligation.”⁶⁸⁵

The use of the *Van Gend en Loos* test as regards competition provisions of the ECSC Treaty comes from the fact that in the ECSC Treaty there is no equivalent provision to Article 104 TFEU, from where the intent of the contracting parties on the self-executing nature of the competition provisions could be inferred. On the contrary. It was generally recognized that in the context of the ECSC Treaty there had been a complete transfer of jurisdiction from the Member States to the ECSC in competition matters regarding the coal and steel sectors, and that the Commission was the sole authority competent to enforce the competition provision of the ECSC Treaty.

Banks was a referral from the High Court of Justice of the United Kingdom, in the context of a dispute between two private parties on the validity of their agreement in the light of ECSC Treaty. Banks was a private company engaged in the production of coal using some methods of extraction under licences granted to it by British Coal. British Coal was a statutory corporation, wholly owned by the Government. Pursuant to the Coal Industry Nationalization Act of 1946, British Coal had the sole right to work and get coal in Great Britain and to grant licenses to third parties⁶⁸⁶ These could be either “royalty licences”, whereby the licensee would pay a royalty per tonne of coal produced and could sell the coal

prohibited agreements between undertakings, decisions of undertakings and concerted practices that restrict or distort competition within the common market of coal and steel. Article 66(7) of the ECSC Treaty contained a provision prohibiting the abuse of dominant position in the common market of coal and steel.

⁶⁸⁴ Judgment of 6 April 1962, *De Geus en Uitdenbogerde v Bosch and others*, Case 13/61, EU:C:1962:11

⁶⁸⁵ *Ibid*, at 51.

⁶⁸⁶ *Ibid*, paragraph 3.

to third parties, or “delivered licences,” whereby the licensee is obliged to sell it to British Coal at a price specified in the agreement. In 1991, Banks had brought an action for damages against British Coal before the High Court of Justice. It contested that the level of royalty set by British Coal under royalty licences was excessive and prevented Banks from making a reasonable profit, and that the price paid by British Coal under delivered licenses was unreasonably low. The High Court of Justice stayed proceedings and referred several questions to the CJEU, including:

*“Are articles 4(d), 60, 65, and/or 66(7) of the ECSC Treaty directly effective and such as to give rise to rights enforceable by private parties which must be protected by national courts?”*⁶⁸⁷

The CJEU excluded the applicability of Article 60 ECSC Treaty.⁶⁸⁸ It then proceeded with the analysis of the other provisions in question. The CJEU, stated that “it was necessary to see whether Articles 4(d), 65 and 66(7) ECSC Treaty are clear, unconditional provisions which confer directly on individuals’ rights which the national courts must protect.”⁶⁸⁹ Contrary to the opinion of the AG, the CJEU considered that none of the provisions had direct effect as they were not unconditional. They all need a decision of the Commission establishing that that there had been a breach.

Article 4(d) was not applicable alone, therefore, could not have direct effect.⁶⁹⁰

“As regards Article 65, the second subparagraph of its fourth paragraph confers on the Commission sole jurisdiction, subject to the review by the Court of First Instance and the Court of Justice, to rule on the compatibility of Article 65 of any agreement prohibited by the first paragraph. Accordingly, as long as such incompatibility has not been established by the

⁶⁸⁷ Ibid, paragraph 7.

⁶⁸⁸ Ibid, paragraph 13.

⁶⁸⁹ Ibid, paragraphs 11 and 14 respectively.

⁶⁹⁰ Ibid, paragraph 16.

Commission itself, individuals may not plead, in proceedings before national courts, that an agreement is incompatible with Article 65.”⁶⁹¹

The Court considered the same as regards Article 66 as its paragraph 7 “reserves to the Commission the power to verify whether public or private undertakings which, in law or in fact, hold or acquire in the market for one of the products within its jurisdiction a dominant position shielding them against effective competition in a substantial part of the common market are using that position for purposes contrary to the objectives of the Treaty. The conferral of sole jurisdiction on the Commission precludes individuals from relying directly on that provision in proceedings before the national court.”⁶⁹²

Uniformity could not have been a consideration when the CJEU declared the direct effect of Articles 101 and 102 TFEU

Irrespective of the test followed by the CJEU, a uniform implementation of these provisions could not have been a consideration when the CJEU declared the direct effect of Articles 101 and 102 TFEU, for two main reasons. Firstly, the lack of legislative measures under Article 103 TFEU regarding the powers of the Commission to apply Article 101(3) TFEU had an impact on the provisional validity of anti-competitive agreements. Secondly, the absence of the primacy of EU law compromised consistency in EU competition law enforcement.

The possibility of a consistent application of Articles 101 at the time their direct effect was confirmed was expressly recognized by the CJEU. After inferring direct effect of these provisions from Articles 104 and 105 TFEU, the CJEU stated:

“Articles [104] and [105] are, however, not of such a nature as to ensure a complete and consistent application of article [101] so that their mere existence would permit the assumption that article [101] had been fully effective from the date of entry into force of the treaty and in particular that the annulment envisaged by article [101] (2) would have taken effect in all those cases falling under the definition of article

⁶⁹¹ Judgment of 13 April 1994, *Banks v British Coal*, C-128/92, EU:C:1994:130, paragraph 17.

⁶⁹² *Ibid*, paragraph 18.

[101] (1) and in respect of which a declaration under article [101] (3) had not yet been made.”⁶⁹³ (emphasis added)

The lack of capacity of Articles 104 and 105 TFEU to achieve a “complete and consistent” application of Article 101 TFEU was clear in the sector of air transport. The (provisional) validity under Article 101 TFEU of a tariff price agreement differed if the agreement was covered by the scope of the Regulation pursuant to Article 103 with a view to organizing the Commission’s powers to grant the exemptions under Article 101(3). In *Silver Line*⁶⁹⁴ the CJEU dealt with a preliminary reference by the German Federal Court of Justice, *Bundesgerichtshof*, regarding notably the compatibility of certain tariff fixing agreements applicable to scheduled passenger flights under Articles 101 and 102 TFEU. Regulation 141⁶⁹⁵ excluded the air transport from the application of Regulation 17/62, which contained the Commission’s powers to enforce Articles 101 and 102 TFEU. Article 101 and 102 TFEU remained nevertheless applicable to the sector, under the enforcement system established by Articles 104 and 105 TFEU.⁶⁹⁶ Those rules were eventually enacted by the Council in 1987. They included *inter alia*, Regulation 3975/87 which laid down the procedures for the application of the rules of competition to undertakings in the air transport sector, and Regulation 3976/87 on the application of Article 101(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector.⁶⁹⁷ These measures, however, were only applicable to international air transport between Community airports. Air

⁶⁹³ Ibid.

⁶⁹⁴ Judgment of 11 April 1989, *Ahmed Saeed Flugreisen and Others v Zentrale zur Bekämpfung unlauteren Wettbewerbs*, Case 66/86, EU:C:1989:140.

⁶⁹⁵ Regulation 141 of the Council exempting transport from the application of Council Regulation 17/62, OJ 124, 28.11.1962, p. 2751–2751 English special edition: Series I Volume 1959-1962 P. 291 – 292.

⁶⁹⁶ Judgement of 30 April 1986, Joined cases 209 to 213/84, *Ministère public v Asjes*, EU:C:1986:188.

⁶⁹⁷ Regulation 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector [1987] OJ L374/01; Regulation 3976/87 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [1987] OJ L374/09; Directive 87/601/EEC on fares for scheduled air services between Member States [1987] OJ L374/12 and Decision 87/602/EEC on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States [1987] OJ L374/19.

transport services between airports in a given Member State or between these airports and a third country were therefore excluded.

The CJEU was called to assess the validity of tariff fixing agreements under Articles 101 and 102 TFEU. As to the application of Article 101 TFEU the CJEU held that it was necessary to make a distinction between tariff fixing agreements covering flights between airports of Member States and those covering flights between the airports within the same Member State or between a Member State and a third country

Regarding the application of the Article 101 TFEU to international air transport services between airports of different Member States, the CJEU considered that those agreements were automatically void under Articles 101 (2) TFEU only in one of the following three eventualities:⁶⁹⁸

- (i) *no application has been submitted to the Commission under Article 5 Regulation 3975/87;*
- (ii) *the application received a negative response from the Commission within the 90-day time limit,*
- (iii) *the time-limit expired without any response on the part of the Commission but the six-year period of validity of the exemption has expired or the Commission withdrew the exemption within the six-year period.*

As the new Regulations did not apply to air transport services between airports within the same Member State, or to international air transport services between an airport of a Member State and an airport of third country, the provisional arrangements under Articles 104 and 105 TFEU remained applicable. Therefore, tariff agreements regarding these air transports remained applicable. As such, they were only to be considered void under

⁶⁹⁸ Judgment of 11 April 1989, *Ahmed Saeed Flugreisen and Others v Zentrale zur Bekämpfung unlauteren Wettbewerbs*, Case 66/86, EU:C:1989:140, paragraph 26.

Article 101(2) TFEU where either the authorities of the Member States in which the registered office of one of the airlines concerned is situated or the Commission, acting under Articles 104 and 105 respectively, have ruled or recorded that the agreement is incompatible with Article 101 TFEU.⁶⁹⁹

This was different for Article 102 TFEU.⁷⁰⁰ The CJEU held that “[i]n contrast, no exemption may be granted, in any manner whatsoever, in respect of abuse of a dominant position; such abuse is simply prohibited by the Treaty and it is for the competent national authorities or the Commission, as the case may be, to act on that prohibition within the limits of their powers.”⁷⁰¹ The CJEU then stated that “[i]t must therefore be concluded that the prohibition laid down in Article 102 of the Treaty is fully applicable to the whole of the air transport sector.”⁷⁰²

The inconsistency of the application of Articles 101 TFEU to the air transport sector was notorious. The fact that the enforcement of Article 101 TFEU should be done under the Regulations regarding the application of the Treaty’s competition provisions to this sector, or under Articles 104 and 105 TFEU had an impact on the provisional validity of the tariff fixing agreements at the time. Also, even if Article 102 TFEU remained fully applicable to the sector, the investigation of the agreements not covered by the abovementioned Regulations by the Commission was done under article 105 TFEU. This article provides neither

⁶⁹⁹ Ibid, paragraph 29.

⁷⁰⁰ Concerning the validity of the same agreements under Article 102 TFEU, it was argued that the same distinction between agreements covered by regulations enacted by the Council under Article 103 TFEU specifically for the air transports should be maintained. The Commission and the United Kingdom claimed that in the absence of the necessary provisions for the systematic implementation of Article 102, action against abuse of dominance position could be taken only under the provisory arrangements of Articles 104 and 105 TFEU. They argued in their support that the wording of Articles 104 and 105 draws no distinction between Articles 101 and 102 and on the nature of the assessments which are to be made of undertakings’ anticompetitive behaviours. The CJEU refused this interpretation and stated that the only reason for the continued application of the rules set out in Articles 104 and 105 is that the practices covered by Article 101(1) may qualify for exemption under Article 101(3). Such exemption is to be given by the institution that has been given jurisdiction under the implementing rules adopted by the Council under Article 103 TFEU.

⁷⁰¹ Ibid.

⁷⁰² Ibid, paragraph 33.

investigatory powers to the Commission nor powers to impose pecuniary sanctions. The Commission is dependent on the cooperation with the Member States. The action of the Commission is much more limited and the enforcement of Article 102 TFEU in these circumstances was very much dependent on the enforcement priorities of the Member States.

Furthermore, the consistent application of Articles 101 and 102 TFEU could also not have been a consideration in the absence of an established principle of supremacy of EU law. *Bosch* precedes *Costa v ENEL* (1964),⁷⁰³ which first determined the primacy of EU law over national law, as well as *Walt Wilhelm* (1968), that confirmed the primacy of the Treaty's provisions on competition over national laws. It is true that *Van Gend en Loos* also preceded *Costa v ENEL* and so this situation is not specific to the case law of direct effect of Treaty's competition provisions. However, this has particular consequences for the prospect of the uniform application of EU competition law. This is because Article 104 TFEU requires the application of Articles 101 and 102 TFEU by Member States to be done in parallel with their national competition laws. At the time *Bosch* was decided, it was generally accepted by the doctrine that the relevant national authorities ought to enforce their national competition laws even if conflicting with the Treaty's competition provisions.⁷⁰⁴ Baardman argued back in 1960, that because Article 104 TFEU requires national competition authorities to apply both national and EU competition law without a hierarchy between the two legal orders being pre-determined by the Treaty, EU competition law could be overruled by national laws.⁷⁰⁵ The view of the majority was that an agreement to be valid it needed to pass the test of both national and EU competition provisions, even if it was possible to achieve conflicting

⁷⁰³ Judgment of 15 July 1964, *Costa v E.N.E.L.*, Case 6/64, EU:C:1964:66.

⁷⁰⁴ For further discussion on this point, see Michel Waelbroeck, 'Le problème de la validité des ententes économiques dans le droit privé du marché commun ' (1962) *Revue critique de droit international privé* .

⁷⁰⁵ *Ibid*, 423.

results. Waelbroeck pointed out that this was also the view of some national courts such as the Dutch ones.⁷⁰⁶ Therefore, in the absence of an established primacy principle, which would only occur two years after *Bosch*, uniformity in EU competition law was hardly an objective that CJEU could aim for when ascertaining the direct effect of Articles 101 and 102 TFEU.

Direct effect allows (some) discretion

When an EU norm has direct effect the ultimate arbiter of its content is the CJEU, therefore implementing measures cannot involve a margin of discretion as to the content of the provision.⁷⁰⁷ On his work, *Discretionary Powers: A legal study of Official Discretion*, Galligan stated that there is discretion when there is “an express grant of power conferred on officials where determination of the standards according to which power is to be exercised is left largely to them.”⁷⁰⁸ In its broader sense, discretion is “to have a sphere of autonomy within which one’s decisions are in some degree a matter of personal judgement and assessment.”

⁷⁰⁹ The Treaty’s competition provisions are open textured and require interpretation.⁷¹⁰ Under Article 19 TEU, the CJEU is the ultimately responsible for this interpretation. Therefore, neither the Commission nor the court or authorities of the Member States have discretion as to the content of the Treaty’s competition provisions. It is also arguable that regardless of direct effect, in the context of an administrative enforcement system of Articles 101 and 102 TFEU, i.e. where the fines for the breach of these provisions are determined by the same administrative authority that was in charge of the investigation of the

⁷⁰⁶ Michel Waelbroeck, 'L'application des règles de concurrence du Traité de Rome aux Pays-Bas' (1962) *Revue du Marché commun* 115 115.

⁷⁰⁷ Lenaerts and others, *European Union Law* Lenaerts et al., *European Union Law*, 810 referring to the *Opinion of Advocate General Van Gerven of 27 October 1993, Banks v British Coal, C-128/92, EU:C:1993:860*.

⁷⁰⁸ Denis Galligan, *Discretionary Powers: a Legal Study of Official Discretion*, (Clarendon Press 1990), 1.

⁷⁰⁹ Ibid, 8.

⁷¹⁰ See generally Hart, *The concept of law*. Vagueness in law can be preferable to precision, see V. Fon and F. Parisi, 'On the optimal specificity of legal rules' (2007) 3 *Journal of Institutional Economics* ; V. Fon and F. Parisi, *The Economics of Lawmaking* (Oxford University Press 2009).

infringement, the same limit would also follow from the right to a fair trial. This is required by Article 6(1) European Convention on Human Rights (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union, now formally part of the Treaty on European Union.⁷¹¹ Article 6(1) ECHR as interpreted by the European Court of Human Rights does not oppose that enforcement model, however, it requires that the decisions finding such infringements and imposing fines, must be subject to a review by a court exercising full jurisdiction.⁷¹² This is because a decision imposing fines in competition cases involves a "criminal charge" for the purposes of Article 6(1) ECHR. It is well established that Article 6(1) requires that the tribunal determining the "criminal charge" must not only be independent and impartial, but must also have full jurisdiction to examine and determine all questions of fact and law relevant to the dispute before it.⁷¹³ A full jurisdictional review is incompatible with discretion as the court can replace the judgement of the enforcer.⁷¹⁴

⁷¹¹ Article 6 TEU.

⁷¹² *Jussila v Finland*, App. No 73053/01 (ECHR, 23 November 2006) and *Sigma Radio Television Ltd. v Cyprus*, App. No 32181/05 (ECHR, 27 September 2011). Article 6(1) normally requires that the matter is adjudicated upon *at first instance* by an independent and impartial tribunal having full jurisdiction to examine the facts and the law. However, in *Jussila v Finland* the European Court of Human Rights held that there may be a distinction between "hard core" criminal offences and other "criminal" offences "not strictly belonging to the traditional categories of criminal law", citing administrative penalties arising from customs law, competition law or tax surcharges, where the criminal-head guarantees "will not necessarily apply with their full stringency."

⁷¹³ See e.g. *Le Compte, Van Leuven and De Meyer v. Belgium*, App. No 6878/75; 7238/75 (ECHR, 23 June 1981), paragraph 23; *Chevrol v France*, App. No 496336/99 (ECHR 2003-III, 13 February 2003), paragraph 77; *A. Menarini Diagnostics S.r.l. v. Italy*, App. No 43509/08 (ECHR, 27 September 2011), paragraphs 59 to 61 and dissenting judgment of Judge Pinto de Albuquerque in *A. Menarini Diagnostics S.r.l. v. Italy*, paragraph 8. The General Court itself has held that the Commission is not a "tribunal" for the purposes of Article 6(1), but that the judicial control exercised by the General Court over the Commission's decisions satisfies the requirements of Article 6(1), see e.g. Judgment of 14 May 1998, *Enso Española v Commission*, T-348/94, EU:T:1998:102 and Judgment of 11 March 1999, *Aristrain v Commission*, T-156/94, EU:T:1999:53, paragraphs 27-30.

⁷¹⁴ For a discussion on whether the jurisdictional review of the Commission decisions enforcing Articles 101 and 102 TFEU under Article 31 Regulation 1/2003 satisfy the right to a fair trial under Article 6(1) ECHR and Article 47 ECFR see E.g. Christopher Bellamy, 'ECHR and competition law post Menarini: An overview of EU and national case law' e-competition <<http://awa2013.concurrences.com/business-Articles-awards/Article/echr-and-competition-law-post#nh21>>; Ian S. Forrester, 'A Bush in Need of Pruning: the Luxurian Growth of "Light Judicial Review" ' in Clause-Dieter; Marquis Ehlermann, Mel (ed), *European competition law annual 2009 : the evaluation of evidence and its judicial review in competition cases* (Hart Publishing 2010); Ian S. Forrester, 'Due process in E.C. competition cases : a distinguished institution with flawed procedures' (2009) 34 *European Law Review* 817; Wouter P.J.

If discretion to implement norms is suppressed when they have direct effect, can we aim at diversity in the enforcement of EU competition law? I argue we can. “Discretion is a matter of degree.”⁷¹⁵ I argue that direct effect allows some discretion, such as to set positive and negative priorities for the enforcement of Article 101 and 102 TFEU. Discretion can be narrower or wider, depending on the constraints imposed by applicable legislative, constitutional or Treaty provisions.⁷¹⁶ However, it is “unlikely ever to be unlimited”, for “the rule of law requires that no discretion should be unconstrained so as to be potentially arbitrary.”⁷¹⁷ The CJEU has recognised a broad discretion to the Commission when it acts under Article 105 TFEU. To fulfil its task of implementing Articles 101 and 102 TFEU, the Commission has discretion to select the cases which it investigates and in which it continues the proceedings up to the stage of a final decision. In *Automec* the CJEU specifically stated that:

*“(…) it should be observed that, in the case of an authority entrusted with a public service task, the power to take all the organizational measures necessary for the performance of that task, including setting priorities within the limits prescribed by the law, where those priorities have not been determined by the legislature, is an inherent feature of administrative activity. This must be the case in particular where an authority has been entrusted with a supervisory and regulatory task as extensive and general as that which has been assigned to the Commission in the field of competition. Consequently, the fact that the Commission applies different degrees of priority to the cases submitted to it in the field of competition is compatible with the obligations imposed on it by Community law.”*⁷¹⁸

When it comes to the enforcement of Articles 101 and 102 TFEU by the national competition authorities, they are bound in the same way as the Commission by those provisions and the block exemption regulation as interpreted by the CJEU. In the same way as the Commission,

Wils, 'The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker' (2014) 37 World Competition .

⁷¹⁵ Wils, 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement', 355.

⁷¹⁶ Ibid, and text around footnote 4.

⁷¹⁷ Ibid, and text around footnote 4.

⁷¹⁸ Judgment of 18 September 1992, *Automec v Commission*, T-24/90, EU:T:1992:97, paragraph 77.

national competition authorities are not deprived by direct effect of the discretion to set priorities. Therefore, national procedural rules that establish the possibility for the competition authorities of the Member States to set priorities for their enforcement activities are compatible with direct effect of Articles 101 and 102 TFEU. Some national competition authorities have no discretion to set priorities and, for example, to reject complaints on grounds of lack of priority interest. Such is the case of the French Competition Authority⁷¹⁹ and the case of the Portuguese Competition Authority before the review of the competition act of 2003.⁷²⁰ In the UK, the England and Wales High Court has confirmed in *Cityhook* that the Office of Fair Trading (now Competition and Markets Authority)⁷²¹ has a broad discretion to set priorities as to how best allocate its limited resources to enforce the competition provisions efficiently.⁷²²

Discretion to set priorities of the enforcement allows diversity. Generally the reasons for setting priorities are related to the need to efficiently managed limited resources. For example, the *CMA Prioritisation Principles* specifically indicate that:

*"In order to make the best use of our resources in terms of real outcomes for UK consumers, we need to ensure that we make appropriate decisions about which projects and programmes of work we undertake across all areas of our responsibility."*⁷²³

Additionally, the Portuguese Competition Act has to have in consideration the probability of success in proving the infringement, when establishing priorities and deciding to proceed with an investigation.⁷²⁴ This is to avoid allocating resources to cases where the possibility of finding evidence and proving the infringement is very limited.

⁷¹⁹ Bruno Lasserre, 'An interview with Bruno Lasserre' (2010) 13 Global Competition Review .

⁷²⁰ The possibility to establish priorities and to reject complaints for priority considerations has been expressly established under the Competition Act of 2013, Article 7 Law 19/2012.

⁷²¹ The CMA has also adopted prioritisation principles, that area available at: <https://www.gov.uk/government/publications/cma-prioritisation-principles>

⁷²² Judgment of 20 January 2009, *Cityhook v OFT* [2009] EWHC 57 (Admin).

⁷²³ Point 1.4 CMA Prioritisation Principles.

⁷²⁴ Article 7(2) Law 19/2013.

There may however also be reasons directly related to the content of the competition provisions that influence prioritisation such the “over-inclusiveness of the antitrust provisions.”⁷²⁵ Wils argues that it is inherent in the nature of rules that they may be over-inclusive, covering some cases which do not fit under the rationale justifying the rule.⁷²⁶ Competition authorities having discretion as to which cases they pursue could use it not to enforce Articles 101 and 102 TFEU in cases that they find do not fit under the rationale of those provisions. This allows diversity, as different authorities can have different views in that regard. An example that illustrates this and how priorities can determine a difference on the enforcement is provided in the context of the enforcement of Article 102 TFEU. In 2005, DG COMP submitted to public consultation a paper on the application of Article 102 TFEU (then Article 82 EC Treaty) to exclusionary abuses.⁷²⁷ The Bundeskartellamt and the German Ministry of Economics and Technology, though generally supporting the initiative of the Commission, considered that “the possible aim of the Commission to use the discussion paper for a basis of guidelines on Article [102 TFEU] seems to be quite ambitious.”⁷²⁸ A line of disagreement with the Commission was the fact that the Commission considered that the enforcement of Article 102 TFEU should be with a focus on the protection of consumer welfare. The German institutions rejected the idea of moving to the protection of consumer welfare or consumer interests as the primary objective of competition law. They argued that this “view is supported by the case law of the CJEU which states that Article [102], like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or the consumers, but to protect the structure

⁷²⁵ Wils, 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement', 376.

⁷²⁶ Ibid.

⁷²⁷ DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005, available at: <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>.

⁷²⁸ Written Statement of the German Bundeskartellamt and the German Ministry of Economics and Technology on the DG Competition Discussion paper on the Application of Articles 82 of the Treaty to exclusionary abuses, Bonn 2006, p. 2.

of the market and thus competition as such.”⁷²⁹ This disagreement is relevant for the uniformity of enforcement of Article 102 TFEU. The choice of the welfare hampered has an impact on the findings of an infringement. For example, in a case of predatory prices, if the emphasis is placed on consumer welfare, proof of the possibility of recouping of losses is necessary. If there is no possibility of recoupment, “consumers and their interests should in principle not be harmed.”⁷³⁰ However, if the focus is placed on the harm of the competitive process, the possibility of recouping losses need not be demonstrated in order for an infringement to be found.⁷³¹ The CJEU considered in *France Télécom* that “Article [102 TFEU] refers not only to practice which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on an effective competition structure.” The prioritisation on enforcement grounded on the type of welfare affected affects uniformity. Monti illustrates this:

*“national courts and national competition authorities are bound to follow the European Court of Justice's (CJEU's) interpretation of Article [102] and are not bound by the Guidance Paper. It means that there may be a risk of divergent analysis of similar practices if the Commission applies a different standard from the national authorities. Granted the Commission may take steps to ensure that there is a uniform interpretation of Article [102], but it may not prevent divergent views on the interpretation of abuse if this is how the national courts or authorities wish to proceed.”*⁷³² (References omitted)

Monti then adds:

“Having said that, one of the effects of the European Competition Network has been that National Competition Authorities try to develop common approaches, and this may lead National Competition Authorities to follow the Commission's approach.”

⁷²⁹ Written Statement of the German Bundeskartellamt and the German Ministry of Economics and Technology on the DG Competition discussion paper on the Application of Articles 82 of the Treaty to exclusionary abuses, Bonn 2006, p. 5.

⁷³⁰ See Opinion of Advocate General Mazák of 25 September 2008, *France Télécom v Commission*, C-202/07 P, EU:C:2008:520, paragraph 74.

⁷³¹ Judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraph 105.

⁷³² Monti, 'Article 81 EC and Public Policy', 8.

Unlike Monti, however, I am not so convinced that that has happened when it comes both to priority setting. The 2009 Commission's Report on the Functioning of Regulation 1/2003 identifies "the ability of Member States' competition authorities to formally set enforcement priorities" as a relevant aspect of divergence between Member States enforcement systems which "may merit further examination and reflection."⁷³³ The ECN has published "ECN Recommendation to the powers to set priorities."⁷³⁴ However, the entire document is about the "ability of the Authorities to prioritise and plan their work" and the recommendations are only on procedural matters, such as the possibility to open and close cases *ex officio* and the possibility not to initiate a case and reject complaints if they do not consider them to be a priority. There is neither a recommendation on the type of criteria that competition authorities should use to prioritise, nor on the coordination of those criteria. The diversity of criteria that can be used to prioritise is identified in the document:

*"Prioritisation criteria used by Authorities may include, among others, public interest, consumer welfare, market efficiencies, or other substantive, institutional or procedural considerations."*⁷³⁵

It is probable that a coordinated view on the priorities would be easier to achieve on a sector by sector basis. However, there is not much work on sectoral grounds done by the ECN and the one that there is shows and assumes divergence. For example, ECN resolution of Heads of the European Competition Authorities on *The reform of the Common Agriculture Policy*,⁷³⁶

1ST paragraph states that:

"European Competition Authorities are also ready to engage as appropriate in further work with all the stakeholders on those topics to ensure consistency and

⁷³³ Communication from the Commission to the European Parliament and Council, Report on the functioning of Regulation 1/2003, COM(2009)206 of 29 April 2009, para 33.

⁷³⁴ European Competition Network, ECN recommendation on the power to set priorities, available at <http://ec.europa.eu/competition/ecn/documents.html>

⁷³⁵ European Competition Network, ECN recommendation on the power to set priorities, paragraph 3.

⁷³⁶ Resolution of the Heads of the European Competition Authorities of 21 December 2012, The Reform of the Common Agricultural Policy, available at: http://ec.europa.eu/competition/sectors/agriculture/resolution_nca_en.pdf

common approach in the application of competition rules, including market definition.”

Discretion is not incompatible with justiciability

“Competition policy cannot be implemented in a vacuum.”⁷³⁷ This is particularly true when it comes to Article 101 (3) TFEU. Its open texture allows public policy concerns such as environment protection, employment or industrial policy to be taken into consideration when granting an exemption.⁷³⁸ Does direct effect have an impact on the balance of public policy considerations when implementing EU competition law? Can different Member States arrive at different conclusions grounded on their different approaches to public policy’s consideration? Townley argues they can.⁷³⁹ He says that this is true for the free movement rules where the CJEU considers that, “when public policy balancing in the free movement rules, Member States have a margin of appreciation according to their ‘social circumstances and to the importance attached by those states to a legitimate objective under Community law [...] the measures which are likely to achieve concrete results.’”⁷⁴⁰ On the contrary, Odudu considers that balance implies discretion which would be against direct effect. I do not agree. I argue that under the standards defined by the EU competition law as interpreted by the CJEU, the relevant authorities have a ‘margin of appreciation’ that allows diversity in the enforcement of EU competition law provisions. The CJEU considers that the Member States can have different approaches on the relevance of public policy considerations. In *Mac Quen*,⁷⁴¹ regarding the compatibility of a Belgium law that reserved the practice of certain medical acts to medical doctors with the exclusion of opticians, the CJEU stated that:

⁷³⁷ Monti, 'Article 81 EC and Public Policy'.

⁷³⁸ For a detailed discussion see e.g. Rosita Bianca Bouterse, *Competition and integration: what goals count ?* (Kluwer 1994), Chapters 1-4; Goyder and Albors-Llorens, *Goyder’s EC competition law*; Monti, 'Article 81 EC and Public Policy'; Townley, *Article 81 EC and Public Policy*.

⁷³⁹ Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)'.

⁷⁴⁰ Ibid, 216, and ECJ case law mentioned in footnote 131 therein.

⁷⁴¹ Judgment of 1 February 2001, *Mac Quen and Others*, C-108/96, EU:C:2001:67.

*“It should be borne in mind in this regard that the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law (Case C-384/93 Alpine Investments [1995] ECR I-1141, paragraph 51, and Case C-3/95 Reisebüro Broede [1996] ECR I-6511, paragraph 42)”.*⁷⁴²

In *Wouters*, the CJEU considered that:

*“the fact that different rules may be applicable in another Member State does not mean that the rules in force in the former States are incompatible with Community law (see to that effect, Case C-108/96 Mac Quen [EU:C:2001:67], para 33). Even if multi-disciplinary partnership of lawyers and accountants are allowed in some Member States, the Bar of the Netherlands is entitled to consider that the objectives pursued by the 1993 Regulation cannot, having regard in particular to the legal remedies by which members of the Bar and accountants are respectively governed in the Netherlands, be attained by less restrictive means (see, to that effect, with regard to the law reserving judicial debt-recovery activity to lawyers, case C-3/95, Reisebüro Broede v Gerd Sandker [EU:C:1996:487], paragraph 41).”*⁷⁴³

More recently, in *Ordem dos Técnicos Oficiais de Contas* the CJEU redefined *Wouters* test requiring that the regulation does not impose “discriminatory conditions to the detriment of competitors.”⁷⁴⁴ Therefore, diversity in the enforcement of EU competition law can thus be lawfully achieved without national competition authorities having discretion, if it is done within the standards established by the CJEU in interpreting the content of EU competition law. Not all goals can be considered, though. It must be a legitimate goal. In *Wouters* the goal of the restriction was to ensure the proper practice of the legal profession. It has been argued that in *Wouters* the question was one of public policy, so the measure could be said to have a public law character.⁷⁴⁵ Townley points out that if ‘[p]ublic law character is necessary, this could significantly restrict diversity’s scope.’⁷⁴⁶ However, as showed by

⁷⁴² Ibid, paragraph 33.

⁷⁴³ Judgment of 19 February 2002, *Wouters e o.*, C-309/99, EU:C:2002:98, paragraph 108.

⁷⁴⁴ Judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraph 2.

⁷⁴⁵ In this sense see Richard Whish and David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 132.

⁷⁴⁶ Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)', 219.

Townley,⁷⁴⁷ this is not the case, as in subsequent decisions, the CJEU has made no reference to such a requirement. For example, in *Meca Medina* no public actors were involved,⁷⁴⁸ and *Tecnico Oficiais de Contas* the CJEU did not consider it to form part of the standard:

*“However, not every decision of an association of undertakings which restricts the freedom of action of the parties necessarily falls within the prohibition laid down in Article 101(1) TFEU. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives (see, to that effect, Wouters and Others, paragraph 97).”*⁷⁴⁹

Furthermore, public policy has been considered in the context of EU law with direct effect, without a public law character.⁷⁵⁰

Diversity in the enforcement of the Treaty’s competition provisions can nevertheless be achieved, even if Member States (or the Commission) have no discretion over the content of those provisions. Diversity is not incompatible with justiciability.

2. Primacy of EU Competition Law

The previous section concludes that diversity in EU competition law can be attained via nationally diverse interpretation, different balance of public interest within Articles 101 (3) TFEU or by different priorities of enforcement established by the national competition authorities, as direct effect of Articles 101 and 102 TFEU does not constitute a barrier to such diversity.

⁷⁴⁷ Ibid

⁷⁴⁸ Judgment of 18 July 2006, *Meca-Medina and Majcen v Commission*, C-519/04, EU:C:2006:492.

⁷⁴⁹ Judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraph 93.

⁷⁵⁰ For a general overview see Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)'.

The question that is analysed in this section now is whether diversity can be introduced via national laws. Member States remain competent to legislate in the field of competition. How far can Member States enact national competition laws contrary to EU competition rules?

The CJEU affirmed the primacy of EU competition law over conflicting national laws in *Walt Wilhelm*.⁷⁵¹ “Primacy denotes the capacity of [a] Union law to overrule inconsistent norms of national law.”⁷⁵²

If under the principle of primacy of EU law conflicting national laws must be set aside, the possibility of existing diverse national competition law applicable to situation that affect trade between member states is jeopardised. This claim for national competition laws uniform with EU competition rules law seems strong, particularly if we take into consideration the context under which the supremacy of EU competition law was affirmed by the CJEU. Until the CJEU had the occasion to pronounce on the relation between national and EU competition law, a majority of commentators considered that an agreement to be valid needed to pass both national and EU competition law tests. Before the CJEU had the opportunity to rule on the relationship between EU competition provisions and national laws, commentators were divided between the supporters (the majority) and opponents (the minority) of the double barrier theory, defending the existence of a shared or an exclusive competence of the EEC in competition matters, respectively.⁷⁵³

The double barrier theory was supported mainly by German authors,⁷⁵⁴ but not exclusively.⁷⁵⁵ They argued that a cumulative application of the Treaty’s competition

⁷⁵¹ Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4 paragraph 4.

⁷⁵² de Witte, 'Direct effect, supremacy and the nature of legal order', 341.

⁷⁵³ For a general discussion on this point see Michel Waelbroeck and Aldo Frignami, *Commentaire J. Megret, Concurrence* vol 4 (PULB 1997).

⁷⁵⁴ Probably because Germany was at the time the only Member State with a modern competition law. In this sense *ibid*, 11.

⁷⁵⁵ E.g. G. Balladore Pallieri, *Il mercato economico comune e la legislazione italiana antimonopolistica*, *Diritto Internazionale* (1959), 407 ; P. Gori, ' Applicazione parallela del diritto

provisions and the Member States national competition laws was possible. The double barrier theory proceeded on the basis that an agreement may produce effects both within a Member State and in trade between Member States. It should therefore be subject to both national and EU law. Moreover, they argued that the Treaty assumed the co-existence of both sets of laws, as under Article 101 (2)(e), the Council should adopt implementing measures designed in particular “to determine the relationship between national laws and the provisions contained in these sections or adopted pursuant to this Article.”

The proponents of the double barrier theory argued that a cumulative application gave rise to no incompatibility between the Treaty’s competition provisions and national provisions, as both set of laws have different objectives. Moreover, they argued that the Treaty did not limit the power of the Member States to legislate on restrictive practices, even if they affect the entire Community. Therefore, for a practice to be lawful, it needed to respect both competition provisions of the EEC Treaty and Member States’ competition law, i.e. it needed to pass the double barrier. This was also the theory applied by national courts. The proponents of the single barrier theory opposed to this view and argued that the EEC had an exclusive competence on competition.⁷⁵⁶ They argued that the EEC competence on competition excluded all competence of the Member States. Member States keep their competence only to the restrictive agreements and abuses that do not affect trade between Member States.⁷⁵⁷ As such, a practice to be lawful only needed to respect either competition provision of the EEC Treaty if it affected trade between Member States, or national competition laws if trade between Member States was not affected. Catalano, a vocal

comunitário e del diritto nazionale in materia di concorrenza' I *Giurisprudenza Italiana* , 995 ; Roger Houin, 'Conséquences civiles d’une infraction aux règles de concurrence' (1963) *Annales de la Faculté de Liège* , 27 ; David M. Jacobs, 'The Perfume Cases: concurrent Application of Community and National Competition Laws' (1980) *Business Law Review* , 343.

⁷⁵⁶ Waelbroeck and Frignami, *Commentaire J. Megret, Concurrence* , 4.

⁷⁵⁷ Nicola Catalano, 'Rapport entre les règles de concurrence établies par le Traité CEE et les législations des Etats Membres' (1963) *Revue Internationale de Droit Comparé* , 283.

supporter of the single barrier theory, argued that the EEC had been given a general regulatory competence on competition matters, thus excluding Member States intervention. First, this was because under Title I, Part III EEC Treaty competition rules were the object of the “common rules” of the “Community policy”. Furthermore, Catalano also pointed out that Articles 2 and 3 EEC Treaty gave competence to the EEC to establish the Common Market (Article 2) which “*includes a system of ensuring that competence is not distorted* (Article 3(f) EEC Treaty). According to Catalano, when the Treaty established the Customs Union and the internal market, it did not limit only in order to abolish tariffs and quantitative restrictions, it also aimed to protect freedom of circulation of merchandise by ensuring that a system of undistorted competition is in place. Finally, another formal argument advanced by Catalano was that Article 87 EEC Treaty granted normative powers to the Council to implement the principles established in Articles 85 and 86 of the Treaty. In this context, only EEC competition rules would be applicable to a practice affecting trade between Member States. Therefore, it would be enough for a practice to be lawful under EEC competition law as national law would not be applicable, independently of whether it provided the same solution or not. National competition law would only be applicable outside the scope of application of EU competition law that was determined by the notions of “trade between Member States” and the “common market.” Catalano argued that at a first sight the concept of “trade between Member States” seemed to be incompatible with the concept of the “common market”, because the latter has the effect of abolishing national frontiers. Therefore, once the “common market” is achieved, it would not be accurate to speak about “trade between Member States”, as the former has as an objective to abolish national frontiers.⁷⁵⁸ However, this would not endanger the application of the EEC competition rules as the Treaty does not mention imports or exports, only “trade between Member States.”

⁷⁵⁸ Ibid, 273.

This notion of “trade between member states,” has a direct line with the freedom of circulation of goods that is a constituent part of the common market.⁷⁵⁹ Member States remain competent to enact new legislation on competition regarding acts that do not affect trade between Member States and that do not affect competition in the internal market.⁷⁶⁰

The CJEU settled the question of the relationship between the Member States’ and the Treaty’s competition provisions in *Walt Wilhelm*, by giving precedence to the EU competition provisions over national laws.⁷⁶¹ The facts of the case were as follows: in November 1967, the Bundeskartellamt fined four undertakings and three executives for participating in an agreement in breach of Section I of the German Competition Act.⁷⁶² In May 1967, the Commission had also initiated proceedings against the same German undertakings and others that were involved in the same cartel for violation of Article 101 TFEU (then Article 85(1) EEC Treaty). The decision of the Bundeskartellamt was appealed to the Berlin Court of Appeals. The defendants claimed, *inter alia*, that the Bundeskartellamt and national courts had no jurisdiction over the agreement as the Commission has initiated proceedings regarding the same agreement. The Berlin Court of Appeals submitted several questions for preliminary ruling, including on the possibility of parallel proceedings. Of particular relevance here are the first and third questions. In the first question the German court asked whether, when a procedure has already been initiated by the Commission under Article 14 of Regulation 17/62 of 6 February 1962, it is compatible with the Treaty for the national authorities to apply to the same facts the prohibition laid down to by the national law on cartels.⁷⁶³ The third question related to the risk of a different legal assessment of the same

⁷⁵⁹ Ibid, 274

⁷⁶⁰ Catalano argues that once the common market is achieved the space of application of national competition laws would be very limited and most likely only in what concerns abuse of dominance, *ibid*, 275.

⁷⁶¹ Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4.

⁷⁶² Decision of 28th November 1967m WuW/E BKartA 1979.

⁷⁶³ Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4, paragraph 2.

facts and to the possibility of distortion in the common market to the detriment of those subject to the same national law. In this respect the Berlin Court of Appeals made reference to Article 9 Regulation 17/62; to Article 101(3)(f)⁷⁶⁴ and to General Principles of Community law.

The CJEU replied to these questions in its judgment of 13th February 1969, answering questions one and three jointly. It considered that Article 9(3) of Regulation 17/62 only regards the competence of the national authorities to apply Articles 101(1) and 102 of the Treaty where the Commission has taken no action of its own. Therefore, that provision was not applicable to the situation where the national authorities were applying national competition law only.⁷⁶⁵ The Court then stated that Community and national law on cartels consider cartels from different point of view. Therefore, the same agreement could be the object of two sets of parallel proceedings, one before the Commission under Article 101 TFEU, the other before the national authorities under national law.⁷⁶⁶ The Court stated further that its interpretation is confirmed by Article 103(2)(e) TFEU. According to the CJEU it follows from this provision that “in principle the national cartel authorities may take proceedings also with regard to situations likely to be the subject of a decision by the Commission.”⁷⁶⁷ The Court then made an important reservation to the parallel proceedings. It stated that, if the ultimate general aim of the Treaty was to be respected, the parallel application of Community and national competition law can only be allowed in so far as “it does not prejudice the uniform application throughout the common market of the

⁷⁶⁴ Now Article 101 TFEU.

⁷⁶⁵ Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4 paragraph 3.

⁷⁶⁶ *Ibid*, paragraph 3.

⁷⁶⁷ *Ibid*, paragraph 4.

Community rules on cartels and of the full effect of the measures adopted in implementation of those rules.”⁷⁶⁸

As argued by Freeman, the CJEU followed, at least in part, the interpretation of the double barrier theory,⁷⁶⁹ that proceed on the basis that an agreement may produce effects both within a Member States and in trade between Member States, and should therefore be subject to both national and Community law. The cumulative application of national and EU law is possible, but *cum grano salis*: “conflicts between Community law and national competition law cannot be solved otherwise than on the basis of the principle of precedence of Community law.”⁷⁷⁰ The “uniform application throughout the [internal] market” must be guaranteed.⁷⁷¹ If conflicting national law must be set aside under the primacy principle of EU law, must conflicting national competition with EU competition rules be set aside?

This thesis is not concerned in reaching any conclusion or even discussion in detail of the nature of the principle of supremacy of EU law. However, before getting into the discussion on whether supremacy of EU competition rules requires uniform national competition laws, as background the following short reflection on the principle of supremacy of EU law might help to clarify the background to the debate.

The overrated debate on the nature of the EU legal order when assessing the primacy of EU law

Some authors argue that primacy is absolute.⁷⁷² Others do not agree and some instigate Member States to refuse to comply with the CJEU rulings.⁷⁷³ This dichotomy on the nature

⁷⁶⁸ Ibid.

⁷⁶⁹ Freeman, 'The division of powers between the European Communities and the Member States', 168.

⁷⁷⁰ Pescatore, 'Public and Private aspects of European Community Competition Law', 408.

⁷⁷¹ Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4 paragraph 4.

⁷⁷² E.g. Hans Lindahl, 'Sovereignty and Representation in the European Union' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006).

⁷⁷³ Fritz Scharpf, 'The only solution is to refuse to comply with ECJ rulings' (Autumn 2008) *Social Europe Journal*

of the primacy principle, rooted on the nature of the Union law, divides constitutionalist between “monists” and “pluralists”. It is argued however that, since the Treaty of Lisbon, the relevance of the debate on the nature of the EU law has become overrated for the purposes of addressing conflict-solving in the EU. Monists stress the sovereignty in the last instance of the states as the “Master of the Treaties”, grounded on democratic considerations. On the contrary, pluralists stress the co-existence of the two systems, the national and supranational systems with overlapping and interlocking jurisdictions and the absence of any hierarchy between them. There is also a third way that tries to understand the interaction of both systems in the absence of a hierarchy.

On the ground of *Costa v ENEL* jurisprudence,⁷⁷⁴ some authors found the supremacy of the EU Law on the claim of sovereignty in the legal sense of ultimate authority. Lindal argues that the reasoning of the *Costa v Enel* can be constructed as an assertion of sovereignty. He claims that, by recognizing that the Union’s order is a new and independent legal order, the CJEU has denied any external reference point in terms of law making of the new order. This corresponds to a constitutionalisation of the Treaties that assumes that the Union is a sovereign polity.⁷⁷⁵ Weatherill argues that supremacy is an absolute notion. It applies to the priority of any provision directly effective EU law, lower, minor and technical, over any provision of national law however weighty and fundamental.⁷⁷⁶ This idea of a sovereign polity and autonomy of the EU legal order is contested by many. Legal autonomy entails that it is the legal order which determines which activities are governed by it.⁷⁷⁷ Against this legal autonomy, Shilling argues that the only basis on which the Union’s law could claim a certain

⁷⁷⁴ Also on the *Van Gend en Loos* jurisprudence. See Gráinne de Búrca, 'Sovereignty and the Supremacy Doctrine of the European Court of Justice' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006).

⁷⁷⁵ Ibid.

⁷⁷⁶ Stephen Weatherill, *Law and integration in the European Union* (Clarendon Press / Oxford University Press 1995), 106.

⁷⁷⁷ Chalmers, Davies and Monti, *European Union Law - Text and Materials*, 204.

autonomy from the legislative order of the Member States is international law.⁷⁷⁸ This is because, if we consider that the EU is based on a transfer of sovereignty from the Member States to the Union, a national government cannot surrender more than what it has. He claims that the European Treaties cannot be considered a historically first constitution at the time of their conclusion, nor have they developed into such a constitution over time. A natural law of integration does not provide the theoretical basis for the claim of autonomy of the Union's law. The only basis on which the Union could claim a certain autonomy from the legal orders of the Member States is international law. This autonomy is derivative and does not include complete interpretative autonomy. Grimm also argues that the basic legal order of the Union has neither originated in a decision made by its citizens nor is it attributed to them. It is a matter for the Member States to contractually agree upon a basic legal order which is then ratified by each Member States. Therefore, he claims that the Union law has no self-determination, but it is rather of external determination.⁷⁷⁹ It could be said, as Teubner did as regards private transnational regimes, that the EU system experiences the phenomenon described by Jacques Derrida as a "mystical recursivity" whereby a constituent power founds itself while it simultaneously presupposes its own existence.⁷⁸⁰ The EU law gets its supremacy nature from the autonomy of a system that presupposes its own existence which justifies its autonomy. It is a circular reasoning. That explains why some authors, such as Scharpf vociferously claimed that the only solution is to refuse to comply with the CJEU rulings.⁷⁸¹

⁷⁷⁸ Theodor Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 Harvard International Law Journal .

⁷⁷⁹ Dieter Grimm, 'Integration by constitution' (2005) 3 International Journal of Constitutional Law , 207.

⁷⁸⁰ Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012).

⁷⁸¹ Scharpf, 'The only solution is to refuse to comply with ECJ rulings'.

Regarding the interaction of both systems in the absence of a hierarchy, MaCcormick argues that it is determined not by law but by strategy, according to binding mechanisms agreed by the parties.⁷⁸² Maduro argues that the relation between EU and national laws is determined by a “contrapunctual law” developed through an inter-court and other intra-institutional the dialogue.⁷⁸³ Kumm considers that the relation between the two different legal orders follow trans-systemic principles, such as legality, due process, subsidiarity and the respect for fundamental rights.⁷⁸⁴

I argue however that, for the purposes of addressing conflicts in the EU legal order, the relevance of the discussion on the relationship between EU and national laws is overrated. Member States have solved the issue under the Treaty of Lisbon with a rather pragmatic approach.

The controversy on primacy of EU law is fuelled by the different views on the nature of the EU law. From the point of view of the CJEU primacy is an absolute concept that stems from conceiving the EU as an “independent source of law [that] could not because of its special and original nature, be overridden by domestic legal provisions, however framed without being deprived of its character of a community law and without the legal basis of the community itself being called into question.”⁷⁸⁵ The EU legal order in this approach is conceived as having the character of a legal system that encompasses the national legal systems and that has a higher hierarchy. This is because, as formulated by the CJEU in *Costa v ENEL*,

⁷⁸² See in particular, Neil MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 European Law Journal 259.

⁷⁸³ Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006).

⁷⁸⁴ Mattias Kumm, 'The Moral Point of Constitutional Pluralism' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012).

⁷⁸⁵ Judgment of 15 July 1964, *Costa v E.N.E.L.*, Case 6/64, EU:C:1964:66.

“By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves. (...) The obligations undertaken under the treaty establishing the community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories.”⁷⁸⁶

Therefore, from the EU perspective the relation between EU law and national law is determined by the EU itself. When an EU act has direct effect it has primacy over national law.

From the point of view of national legal orders, primacy however is not an absolute principle but a relative one.⁷⁸⁷ This is particularly true in relation to the Member States that have a dualist constitutional tradition. In dualist systems, international legal provisions do not form part of the domestic legal system unless and until they have been incorporated by the national law.⁷⁸⁸ This is opposite to monist constitutional systems that give international legal norms precedence over national laws.⁷⁸⁹ The practical relevance of this distinction is not so much whether the international law will become part of the national legal system or not. In the Member States with a dualist tradition, the international is incorporated in the national legal order by a national law. The practical relevance of this distinction is that the hierarchy between EU and national laws is determined by the national law. Therefore, supremacy of EU law is a matter for national law to decide. This does not mean that all national law will rank higher than EU law. For example, Italy, a country with a dualist tradition, established that EU competition law ranks higher than its national competition act.⁷⁹⁰ But this might mean that sometimes, national law may rank higher, particularly national fundamental

⁷⁸⁶ Ibid.

⁷⁸⁷ Schütze, *European Constitutional Law*, 358.

⁷⁸⁸ E.g. France, Italy and UK.

⁷⁸⁹ E.g. Benelux countries.

⁷⁹⁰ Art. 1 (1) Legge 10 ottobre 1990, n. 287, GURI n. 240 del 13 ottobre 1990.

rights. The relative nature of the EU primacy for the Member States point of view is well illustrated by the jurisprudence of the German Constitutional Court that has imposed a fundamental rights limit to the primacy of EU. The primacy of EU law is not contested, so long as it guarantees similar fundamental rights to those recognised by the German constitution.⁷⁹¹ The German Constitutional Court also formulated a competences limit to the supremacy of the EU, imposing an *ultra vires* control and limit to the scope of EU law. Contrarily the CJEU ruling in *Foto Frost*⁷⁹² that stated that national courts cannot control the validity of the EU law and disapply it, the German Constitution Court considers that it has

⁷⁹¹ This Court considers that ‘so long as the European legal order had not developed an adequate standard of fundamental rights. The German Constitutional Court would disapply European law that conflicted with the fundamental rights guaranteed in the German legal order. This is because *the part of the constitution dealing with fundamental rights is an inalienable essential feature of the valid Constitution of the Federal Republic of Germany and one which forms part of the constitutional structure of the Constitution.* BVerfGE 37, *Internationale Handelsgesellschaft (Solange I)*, English translation available at [1974] CMLR 540, at 550. With the evolution of EU law these national limits were softened. In a more recent case, the German Constitutional Court considered that there has been the creation of a ‘substantially similar’ fundamental right guarantees. Therefore, so long as those substantially similar guarantee would subsist, *the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary [Union] law legislation cited as the legal basis for any act of German courts or authorities within the sovereignty jurisdiction of the Federal Republic courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany and will no longer review such legislation by the standard of the fundamental rights contained in the Constitution.* BVerfGE 73, 339 (*Solange II*) *Re Wünsche Handelsgesellschaft*, English translation available at [1987] 3 CMLR 225, at 265 para 48. in a more recent case, the German Constitutional Court considered that there has been the creation of a ‘substantially similar’ fundamental right guarantees. Therefore, so long as those substantially similar guarantee would subsist, *the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary [Union] law legislation cited as the legal basis for any act of German courts or authorities within the sovereignty jurisdiction of the Federal Republic courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany and will no longer review such legislation by the standard of the fundamental rights contained in the Constitution.* BVerfGE 73, 339 (*Solange II*) *Re Wünsche Handelsgesellschaft*, English translation available at [1987] 3 CMLR 225, at 265 para 48. As to the respect of the competence conferred upon the Union, the German Constitutional Court considered that *Ultra vires review by the Federal Constitutional Court can moreover only be considered if it is manifest that acts of the European bodies and institutions have taken place outside the transferred competences. (...) This means that the act of the authority of the European Union must be manifestly in violation of competences and that the impugned act is highly significant in the structure of competences between the Member States and the statute under the rule of law.* 2 BvR 2661/06 (*Re Honeywell*). For an English translation see [2010] 3 CMLR 276. At 1085-6 (para 46).

⁷⁹¹ Judgment of 22 October 1987, *Foto-Frost v Hauptzollamt Lübeck-Ost*, Case 314/85, EU:C:1987:452.

⁷⁹¹ BVerfGE 89, 155 (*Maastricht decision*). For an English translation see [1994] 1 CMLR 57, confirmed in BVerfGE 123 (*Lisbon decision*), for an English translation see [2010] 3 CMLR 276.

⁷⁹² Judgment of 22 October 1987, *Foto-Frost v Hauptzollamt Lübeck-Ost*, Case 314/85, EU:C:1987:452.

competence to disapply European Law that it founds to be adopted *ultravires*.⁷⁹³ The relative view of primacy of the EU law by the Member States undermines the absolute view of the EU. That is why the Monists need to ground their views on primacy on sovereignty considerations, as the transfer of Member States' sovereignty to the EU would be the basis for the power of the EU law to determine its relation with the national law and not the other way round.

This question on the nature of supremacy of the EU law is a circular question. It can be said that the EU law has absolute primacy because the EU legal order is an autonomous system that stems its power from the transfer of sovereignty of the Member States to the Union. If this premise of an autonomous system fails, absolute primacy of the EU is not sustainable, and thus the legitimacy of the principle to serve as a conflict solving mechanism in case of conflict between national and EU laws can be questioned and alternatives can be proposed. I argue that the relevance of this debate seems to have been set aside up to a considerable extent by the solution found by the Member States in the Treaty of Lisbon.⁷⁹⁴

The CJEU, monists and pluralists constitutionalists have something in common on their approach to EU and Member States law – their starting point. They start by asking an ontological question: “what is the nature of EU law?”, in order to answer a technical one: “how should the conflict between national and EU laws be solved?”⁷⁹⁵ The CJEU and monists constitutionalists differ from pluralists constitutionalists on the answer to the ontological question. Pluralists believe on the autonomy of the EU legal order, while monists believe that

⁷⁹³ BverfGE 89, 155 (*Maastricht decision*). For an English translation see [1994] 1 CMLR 57, confirmed in BverfGE 123 (*Lisbon decision*), for an English translation see [2010] 3 CMLR 276.

⁷⁹⁴ The Draft Constitutional Treaty, Article I- established that The constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States. This formulation was not kept in the Treaty of Lisbon that opted by a longer declaration.

⁷⁹⁵ For an analysis of these questions are regards conflicts of international public law, see Ralf Michaels and Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law' (2012) 22 *Duke Journal of Comparative & International Law* .

the autonomy of EU legal order can only derive from the Member States' legal order. Therefore, they differ on the answer to the technical question. Pluralists believe that primacy of EU law is absolute, while monists believe that there is no such thing as absolute primacy of EU law over national laws.

Member States took a different (and more pragmatic) approach to the interface of EU and national laws. In the Treaty of Lisbon they gave an answer to the interface of EU and national laws by separating the ontological question from the technical one.

Declaration No 17 concerning primacy⁷⁹⁶ annexed to the Treaty of Lisbon that reads as follows:

"17. Declaration concerning primacy

The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

"Opinion of the Council Legal Service

of 22 June 2007

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641 [1]) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice."

⁷⁹⁶ Declaration No 17, annexed to the Treaty of Lisbon, concerning primacy, [2010], OJ C83/344.

The Declaration on the Primacy of EU law confirms the Member States acceptance of primacy as a conflict solving mechanism, without them changing their national approach to the nature of the EU law. The ontological question of the nature of the EU legal order remains unanswered under the Treaties. However, an answer to the technical question was provided: *“the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the laws of Member States under the conditions laid down by the said case law.”*⁷⁹⁷ This reduces the relevance of the discussion of the nature of the EU legal order for the purposes of conflict solving with the national laws. Primacy of EU law over national laws must be analysed on the grounds of the CJEU case law. This is discussed next.

Diversity in not anathema to the primacy of EU (competition) law

“A national rule, which is set aside for being inconsistent with Union law, is inoperative only to the extent of this inconsistency; the rule may continue to be applied to cases where it is not inconsistent, or to cases which are not covered by the EU norm, and it may fully apply again if and when the EU norm ceases to exist.”⁷⁹⁸

The question then is when, and up to what extent, does a national law conflict with an EU law? As asked by Schütze: “how supreme is European law?”⁷⁹⁹ How are conflicts framed? The answer to these questions has an impact on the possibility of Member States to enact diverse national competition laws, as under the primacy principle only national conflicting laws must be precluded. Primacy of EU law will restrain the Member States in the exercise of their regulatory power up to the extent that it conflicts with EU law. Constitutionalists describe this question as “the problem of pre-emption,” which “consists in determining whether there exists a conflict between a national measure and a rule of [EU] law.”⁸⁰⁰ There

⁷⁹⁷ Declaration No 17, annexed to the Treaty of Lisbon, concerning primacy, [2010], OJ C83/344.

⁷⁹⁸ de Witte, 'Direct effect, supremacy and the nature of legal order', 341.

⁷⁹⁹ Schütze, *European Constitutional Law*, 348.

⁸⁰⁰ Michel Waelbroeck, 'The emergent doctrine of Community pre-emption – Consent and delegation' in Terrance Sandalow and Eric Stein (eds), *Courts and Free Markets: Perspectives from the United States and Europe*, vol II (Oxford University Press 1982), 551.

are two types of pre-emption: express and implied. Express pre-emption is determined by the law itself, i.e. to what extent does Member States' law will be pre-empted.⁸⁰¹ In the absence of an express pre-emption, it is for the EU judiciary that determines to what extent Member States is pre-empted by EU law.

Express pre-emption

An example of an expressly authorised derogation of EU competition law exists in the military sector.⁸⁰² Article 346(1) TFEU authorizes a Member State to take unilateral measures where “the essential interests of its security which are connected with the production of or trade in arms, munitions and war material” are at stake or “in the serious of internal disturbance affecting the maintenance of law and order, in the event of war, serious international tension constitution a threat of war or in order to carry out obligations entered into by the Member State for the purpose of maintaining peace and international security which are connected with the production of or trade in arms, munitions and war material.” A list adopted by the Council by unanimous vote enumerates the products to which Article 346 TFEU applies.⁸⁰³ This safeguard clause allows derogation of EU competition law regarding products intended for specifically military purposes. Compared to other safeguard clauses in the Treaties, such as the ones in Articles 114(6) TFEU, 143(3) TFEU and 348 first paragraph TFEU; Article 346 TFEU gives a full margin of intervention to the Member States that can act unilaterally, not being dependent on an authorization of the Commission. Under Article 347 TFEU, if the Commission or another Member State, consider that a Member State made an improper use

⁸⁰¹ See Schütze, *European Constitutional Law*, 367.

⁸⁰² Articles 346 to 348 TFEU allow Member States to deviate from their legal obligations under the Treaty on the grounds of internal or external security. These provisions do not authorise any derogation from principles of liberty, democracy and respect from human rights fundamental freedoms. See Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, Joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 302-303.

⁸⁰³ Common list of military equipment covered by the European Union code of conduct on arms export, adopted by the Council on the 23 February 2009, [2009] OJ C65/1.

of the safeguards of Articles 346 or 347 TFEU may bring the matter before the CJEU (Articles 258 and 259 TFEU).

Implied pre-emption

As regards competition Treaty's provisions in general, the Treaty assumes the co-existence of national laws under Article 103(2)(e) TFEU, therefore, there is no such thing as express pre-emption.⁸⁰⁴ This also seems to be the understanding of the CJEU when in *Walt Wilhelm* it stated that:

"(...) one and the same agreement may, in principle, be the object of two sets of parallel proceedings, one before the community authorities under article [101 TFEU], the other before the national authorities under national law."

And that:

"this interpretation is confirmed by the provision in article 87(2)(e), which authorizes the Council to determine the relationship between national laws and the community rules on competition; it follows that in principle the national cartel authorities may take proceedings also with regard to situations likely to be the subject of a decision by the Commission."

Therefore, the extent to which national laws will conflict with Treaty's competition provisions will depend on the interpretation of the CJEU in order to understand whether there is an "implied pre-emption" on the national laws by Article 101 and 102 TFEU.

⁸⁰⁴ Freeman, 'The division of powers between the European Communities and the Member States', 168.

Building on the work of Cross,⁸⁰⁵ Goucha Soares,⁸⁰⁶ Waelbroeck,⁸⁰⁷ Weiler,⁸⁰⁸ and more recently Arena⁸⁰⁹ and Schütze,⁸¹⁰ three types of EU implied pre-emption are generally identified: field pre-emption, obstacle pre-emption and rule pre-emption, on the grounds of the CJEU approach to conflicts between EU and national laws.⁸¹¹ They correspond to different “degrees of normative conflicts” which “reflect the various judicial reasons and arguments created to explaining why national law conflicts with European law.”⁸¹² This terminology was developed “in linguistic alliance with the US America constitutionalism”⁸¹³ where the doctrine of pre-emption was developed by the US Supreme Court.⁸¹⁴ In the EU, the CJEU has not yet developed its terminology or theory(ies) of pre-emption.⁸¹⁵ No decision of the CJEU mentions it. The theory is referred to in two opinions of Advocates Generals, first

⁸⁰⁵ Daniel Eugene Cross, 'Pre-emption of Member State Law in the European Economic Community: A framework for analysis' (1992) 29 Common Market Law Review .

⁸⁰⁶ António Goucha Soares, 'Pre-emption, conflicts of powers and subsidiarity' (1998) 23 European Law Review

⁸⁰⁷ Waelbroeck, 'The emergent doctrine of Community pre-emption – Consent and delegation'.

⁸⁰⁸ J.H.H. Weiler, 'Community system: The dual character of supranationalism' (1981) 1 Yearbook of European Law .

⁸⁰⁹ Amadeo Arena, 'The Doctrine of Union Preemption in the EU Single Market: Between Sein and Sollen' (2003) Working Paper 03/10 The Jean Monnet Center of International and Regional Economic Law & Justice, The NYU Institute on the Parks .

⁸¹⁰ Robert Schütze, 'Supremacy without pre-emption? The very slow emergent doctrine of Community pre-emption ' (2006) 43 Common Market Law Review .

⁸¹¹ For an exhaustive view of the evolution of the EU doctrine of pre-emption see Arena, 'The Doctrine of Union Preemption in the EU Single Market: Between Sein and Sollen'.

⁸¹² Schütze, *European Constitutional Law*, 364.

⁸¹³ Ibid, 365.

⁸¹⁴ The US Supreme Court described the three type of pre-emption theories in *Pacific Gas & Electric Co v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190(1983), at 203-4 as follows:

'Congress intent to supersede state law altogether may be found from a scheme of the federal regulation so pervasive as to make reasonable the interference that Congress left no room to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject and the character obligations imposed by it may reveal the same purpose (...).Even where Congress has not entirely displaced state regulations in a specific area, each state is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, (...) or where state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of the Congress. [Quotations and references omitted]

⁸¹⁵ Generally, it is necessary to use caution when comparing the EU to the US, as the nature of federation of the EU, contrarily to the US, hasn't been established. However, independently of the debate on the nature of the EU, federalism, as a constitutional theory that allocates power between different levels of power, can provide students of the EU relevant insights.

in 2009, by AG Ruiz-Jarabo Colomer,⁸¹⁶ and more recently, in 2017, by AG Szpunar.⁸¹⁷ “Indeed the CJEU may not need to develop a general theory of pre-emption, preferring to examine, on a case by case basis, whether the very substance of a particular rule of EU law precludes national competence, as illustrated by the contrast between the *Ratti* and *Gallagher* cases discussed in the next section.”⁸¹⁸

However, despite no “official” reference to pre-emption in any decision of the CJEU, supremacy and pre-emption are “two sides of the same coin,”⁸¹⁹ or “two Siamese twins : different through inseparable. There is no supremacy without preemption”⁸²⁰ To place the debate in context, the main types of pre-emption are now briefly discussed.”

Field pre-emption

Field pre-emption refers to those situations where the Court excludes action from the Member States on the grounds that the EU legislator has exhaustively legislated the field. The CJEU does not investigate any material normative conflict, but rather excludes any legislative action of the Member States. The consequence of this is that Member States may not introduce legislation that is more restrictive or even more detailed or in any event different than the EU legislation.⁸²¹ It has been said that the underlying idea of field pre-emption is a “purely abstract conflict criterion: national legislation conflicts with the jurisdictional objective of the Union legislator to establish an absolutely uniform legal standard.”⁸²² Thus, in such situations EU law represents an exhaustive set of rules, not

⁸¹⁶ Judgment of 8 September 2009, *Budějovický Budvar*, C-478/07, EU:C:2009:52, paragraph 93.

⁸¹⁷ Opinion of Advocate General Szpunar of 24 April 2017, *Germany v Council*, C-600/14, EU:C:2017:296, paragraph 71.

⁸¹⁸ In *Ratti* the EU law in question amounted to full (or complete or exhaustive) harmonisation whereas the EU law in *Gallagher* constituted minimum harmonisation. The degree of preemption of national law by the EU rules was necessarily different in both cases.

⁸¹⁹ Krisov, Clause-Dieter Ehlermann and J.H.H. Weiler, 'Organs and the decision-making process in the United States and in the European Community' in Mauro Cappelletti, Monica Seccombe and Joseph Weiler (eds), *Integration Through Law: Europe and the American Federal Experience Vol 1: Methods, Tools and Institutions* (1986), 90.

⁸²⁰ Schütze, *European Constitutional Law*, 348.

⁸²¹ Judgment of 5 April 1979, *Ratti*, Case 148/78, EU:C:1979:, paragraphs 26-27.

⁸²² Schütze, *European Constitutional Law*, 365.

leaving the space for national laws that are more detailed or restrictive than EU law. An example of a field pre-emption is given by *AETR* case concerning common transport policy.

The CJEU considered that the EU exercise of powers in regard to that common policy:

*“excludes the possibility of concurrent powers on the part of the Member States, since any step taken outside the framework of the [Union] institutions would be incompatible with the Unity of the common market and the uniform application of [Union] law.”*⁸²³

Also, in *Ratti*, the CJEU considered an entire field pre-empted by EU law. The CJEU considered that under Directive 73/173 on the approximation of Member States’ laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous preparations (solvents),⁸²⁴ Member States were “not entitled to maintain, parallel with the rules laid down by the Directive for imports, different rules for the domestic market.”⁸²⁵ This was the result of the system established therein that “a Member State may not introduce into its national legislation conditions which are even more detailed or *in any event different*.”⁸²⁶

Obstacle pre-emption

Obstacle pre-emption, as stated by Arena,⁸²⁷ is found whenever the CJEU considers that a national measure “interferes with the proper functioning”⁸²⁸ of an EU legislation, or when it “endangers its objectives,”⁸²⁹ “even if the matter in question has not been exhaustively regulated by it.”⁸³⁰ The conflict does not result from a “normative friction”⁸³¹ between a

⁸²³ Judgment of 31 March 1971, *Commission v Council*, Case 22/70, EU:C:1971:32

⁸²⁴ OJ L 189, 11.7.1973, p. 7–29.

⁸²⁵ Judgment of 5 April 1979, *Ratti*, Case 148/78, EU:C:1979:110, paragraph 26.

⁸²⁶ *Ibid*, paragraph 25.

⁸²⁷ Arena, 'The Doctrine of Union Preemption in the EU Single Market: Between Sein and Sollen', 31.

⁸²⁸ Judgment of 27 November 1997, *Danisco Sugar v Allmänna ombudet*, C-27/96, EU:C:1997:563, paragraph 24.

⁸²⁹ Judgment of 18 October 1979, *Buys*, Case 5/79, EU:C:1979:238, paragraph 4; Judgment of 12 December 1973, *Grosoli*, Case 131/73, EU:C:1973:158, paragraph 13.

⁸³⁰ Judgment of 25 March 2004, *Industrias de Deshidratación Agrícola*, C-118/02, EU:C:2004:182, paragraph 20; Judgment of 8 January 2002, *Denkavit*, C-507/99, EU:C:2002:4, paragraph 32.

⁸³¹ Judgment of 30 November 1978, *Francesco Bussone v Ministro dell'agricoltura e foreste*, Case 31/78, EU:C:1978:217.

national law and the EU law, or a “direct incompatibility between the content of one or another,”⁸³² but from the fact that a national law interferes with the proper functioning of the EU law or impedes the objectives of the EU legislation. A traditional example⁸³³ of obstacle pre-emption reasoning is the approach of the CJEU in *Francesco Bussone v Ministro dell'agricoltura e foreste*.⁸³⁴ The CJEU specifically mentioned that:

*“in the absence of express provisions on the compatibility with the organization of the market established by [the] Regulation (...) of national rules adopted for the implementation of those regulations, it is necessary to seek the solution to the question asked in the light of the aims and objectives of the regulations within the context of the principles laid down by the treaty itself.”*⁸³⁵

Rule pre-emption

Finally, the most tangible type of conflict takes place where national legislation directly contradicts a specific EU rule. “Put negatively where the national law does not contradict a specific [EU] provision, it will be allowed.”⁸³⁶ The example that is traditionally given to illustrate this type of pre-emption is *Gallagher*.⁸³⁷ In this case the issue was the compatibility of the UK law transposing the Directive 89/622. While the directive required that the health warning on tobacco products should “cover at least 4% of the corresponding surface,” the British law required that type of warning to cover at least 6% of the label surface. The CJEU considered that “Member States are at liberty to decide that the indications and warning are to cover a greater surface area in view of the level of public awareness of the health risks associated with tobacco consumption.”⁸³⁸ A rule pre-emption allows a stricter national

⁸³² Soares, 'Pre-emption, conflicts of powers and subsidiarity', 137.

⁸³³ See Schütze, *European Constitutional Law*, 366.

⁸³⁴ Judgment of 30 November 1978, *Francesco Bussone v Ministro dell'agricoltura e foreste*, Case 31/78.

⁸³⁵ Ibid.

⁸³⁶ Schütze, *European Constitutional Law*, 367.

⁸³⁷ Judgment of 22 June 1993, *The Queen v Secretary of State for Health, ex parte Gallagher and Others*, C-11/92, EU:C:1993:262.

⁸³⁸ Ibid, paragraph 20.

measure as it does not contradict the EU law standard. From the three types of pre-emption, this is the one that respects the most the sphere of the Member State.

The impact of pre-emption on diversity in EU competition law

The way CJEU frames the relation between EU and national laws will determine to what extent the latter conflicts with the former. Depending on the type of pre-emption doctrine used by the CJEU the vertical distribution of powers between the EU and Member States can result in a more or less scope of intervention by the national legislature, therefore, more or less diversity allowed. Where the doctrine of field pre-emption is used, this corresponds to a *de facto* removal of the field from the domain of shared competence and its inclusion in an exclusive competence of the EU. There is no more space for Member State action. In the words of Weatherill, “once the Community has acted, if it acts, it then assumes exclusive competence in the field which it has occupied, thereby transforming concurrent State/Community competence into exclusive Community competence”.⁸³⁹ This modality of pre-emption is thus the one “that causes the most damage to the sphere of national powers (...) [as it is] imbued with an exclusivist reasoning, because it tends to overcome the regulatory competitiveness in force.”⁸⁴⁰

The doctrine of obstacle pre-emption, on the other hand, causes less disruption to the sphere of Member States regulatory power than field pre-emption. As stated by Goucha Soares, it “presupposes abandonment of the perspective of the vertical division of powers according to which adoption of rules by the [EU] in areas subject to power-sharing with the States, it fated to replace the latter’s regulatory prerogatives.”⁸⁴¹ The vertical division of powers is not transformed into a *de facto* exclusive power of the EU in areas of shared competence.

⁸³⁹ Stephen Weatherill, 'Beyond preemption? Shared competence and constitutional change in the European Community' in David O'Keeffe and Patrick M Twomey (eds), *Legal issues of the Maastricht Treaty* (Wiley Chancery Law; United Kingdom Association for European Law; University Association for Contemporary European Studies 1994), 14.

⁸⁴⁰ Soares, 'Pre-emption, conflicts of powers and subsidiarity', 137.

⁸⁴¹ Ibid, 138.

However, as argued by Shutze, national laws are still pre-empted as “[a]ny obstacle that reduces the effectiveness of the Union system may be seen to be in conflict with European law.”⁸⁴²

Finally, rule pre-emption is the one which has the least impact on the Member States’ sphere of competence. As explained by Goucha Soares, this is because the “sole basis to prevent the Member States from legislating on a certain question regarding an area of power shared with the [Union] is by verification of a direct conflict between the regulatory provisions arising from both levels of regulation. In all other situations, [EU] law, as in particular the exercise of material power deriving from its area of action, is not held to threaten the regulatory authority of the States.”⁸⁴³

Which theory(ies) of pre-emption is applicable in EU competition law?

In *Walt Wilhelm*, the CJEU established a clear rule of primacy of the EU competition law over conflicting national laws. However, the CJEU did not automatically preclude national laws dealing with the same facts of Articles 101 and 102 TFEU.⁸⁴⁴ As argued by Pescatore, the CJEU made it clear in *Walt Wilhelm* that there was room for simultaneous application of national and competition law to an agreement that had produced effects at national as well as at EU level.⁸⁴⁵ This seems to confirm that the CJEU rejected a field pre-emption approach, as it did not consider that the constituent legislator had regulated the entire field with Articles 101 and 102 TFEU. There was space for national competition laws. The CJEU however, subjected the application of national laws to an important qualification:

“if the ultimate general aim of the treaty is to be respected, this parallel application of the national system can only be allowed in so far as it does not prejudice the uniform application throughout the common market of the community rules on

⁸⁴² Schütze, *European Constitutional Law*, 366.

⁸⁴³ Soares, 'Pre-emption, conflicts of powers and subsidiarity', 138.

⁸⁴⁴ Kurt Markert, 'Co-existence of Community and National Competition Law' (1974) 11 *Common Market Law Review*, 93.

⁸⁴⁵ Pescatore, 'Public and Private aspects of European Community Competition Law', 407.

*cartels and of the full effect of the measures adopted in implementation of those rules.*⁸⁴⁶

Does this amount to field pre-emption? That would be the case if national laws that were in any event different to competition laws were considered in conflict with the Treaty's competition provisions. I argue it does not.

In the “perfume cases,” a referral by the *Tribunal de Grand Instance*, of Paris, related to selective distribution of luxury perfumes by several manufacturers – Guerlain, Rochas, Lanvin and Ricci,⁸⁴⁷ the CJEU was asked on the compatibility with the Treaty of stricter national competition laws. All of the referred perfume companies had notified their distribution agreements to the Commission under Regulation 17/62, to obtain an exemption under Article 101(3) TFEU. After introducing some required changes to the agreements, they all received an almost identical letter from the Director General for Competition stating that there was no need to take any further action under Article 101(1) TFEU and that the file would be closed. In parallel, the representatives of those companies were ordered to appear before the *Tribunal de Grand Instance de Paris*, where plaintiffs claimed damages against the abovementioned perfume manufactures for refusing to fill orders for perfumery. In France, the law prohibited refusal to sell subject to certain exceptions including exclusive dealing agreements. Such an agreement could constitute an exception to the prohibition of a refusal to sell where it fulfils certain conditions, such as e.g. the interest of consumers, the absence of imposed prices, any idea of fraud on the right of third parties and of any intention voluntarily to restrict competition.⁸⁴⁸ The *Tribunal de Grand Instance de Paris* referred a question to the CJEU with the purpose to understand whether the letters from the

⁸⁴⁶ Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4, paragraph 4.

⁸⁴⁷ Judgment of 10 July 1980, *Procureur de la République v Giry and Guerlain*, Joined cases 253/78 and 1 to 3/79, EU:C:1980:188.

⁸⁴⁸ *Ibid.*

Commission prevented the application of the provisions of French legislation which prohibited a refusal to sell. During the proceedings before the CJEU, the defendants in the main proceedings claimed that the application of national competition law could not be permitted where it would result in an exemption granted by a decision or a block exemption being called into question. France, and the UK in its support, argued that there has not been any decision of the Commission exempting the agreement under Article 101(3) TFEU and that it remained competent to apply its national law. Also the Commission confirmed that there has been no decision to exempt the agreements in question under Article 101(3) TFEU. It added that it also considered that the Treaty's provisions did not prohibit the national authorities from applying the French law to agreements not covered by prohibitions laid down in Articles 101(1) TFEU. According to the Commission, this was in line with the jurisprudence of the CJEU on the conditions for the applications of Article 101(1) and 102 TFEU intended to determine the scope the Member States in the field of rules relating to agreements.⁸⁴⁹

In its analysis the CJEU started by recalling *Walt Wilhelm* and the fact that “National authorities may also take action in regard to situations which are capable of forming the subject matter of a decision by the Commission.”⁸⁵⁰ It then mentioned that in “the above-mentioned judgment the Court stressed that parallel application of national competition law can only be permitted in so far as it does not prejudice the uniform application, therefore the common market, of the Community rules on cartels or the full effects of the measures adopted in implementation of those rules.”⁸⁵¹ The CJEU however, considered that the formalities for a negative clearance could not be applicable to the agreement, and thus it did not benefit from any decision in application of Article 101(3) TFEU. In the same sense, it was

⁸⁴⁹ Ibid.

⁸⁵⁰ Ibid, paragraph 15.

⁸⁵¹ Ibid, paragraph 16.

not in dispute that those agreements did not come within the scope of any regulation granting block exemption.⁸⁵² The CJEU then expressly stated that the fact that an agreement that can be subject to the Commission's decision is deemed not to infringe Article 101(1) TFEU,

"cannot by itself have the result of preventing the national authorities from applying to those agreements provisions of national competition law which may be more rigorous than Community law in that respect."

The CJEU then it also added that:

*"The fact that a practice has been held by the Commission not to fall within the ambit of application of the prohibition contained in Article [101](1) and (2), the scope of which is limited to agreements capable of affecting trade between Member States, in no way prevents that practice from being considered by the national authorities from the point of view of the restrictive effects which it may produce nationally."*⁸⁵³

The CJEU was clear on the fact that a national competition law that is stricter than the Treaty's competition provisions is not in conflict with the EU law.⁸⁵⁴ It is true that these cases concerned a comfort letter, which might be a ground of distinction, but it is submitted that the dictum of the CJEU remains powerful as it addresses directly the issue of the primacy of the EU competition law over a more strict national competition law. In the more recent case of *Tele2Polska*,⁸⁵⁵ discussed and criticised below, the CJEU held that the national authorities had no power under Article 5 of Regulation 1/2003 to hold that there was no violation of

⁸⁵² Ibid, paragraph 17.

⁸⁵³ Ibid, paragraph 18.

⁸⁵⁴ The CJEU however left open the question on whether, under the parallel application of the EU and national competition law, an agreement exempted under Article 101(3) TFEU could be prohibited under national laws? The doubt raised as in the Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4, paragraph 4, the Court stated that:

While the treaty's primary object is to eliminate by this means the obstacles to the free movement of goods within the common market and to confirm and safeguard the unity of that market, it also permits the community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activities within the whole community, in accordance with Article 2 of the Treaty.

⁸⁵⁵ Judgment of 3 May 2011, *Tele2 Polska*, C-375/09, EU:C:2011:270.

Articles 101 and 102. This case however seems to centre on the textual consideration of Article 5 of Regulation 1/2003 and does not address the question of the applicability of stricter national laws.⁸⁵⁶

An exemption granted by the Commission under Article 101 (3) TFEU was considered by some as within the “certain positive, though indirect action” mentioned by the CJEU, and therefore covered by the primacy principle.⁸⁵⁷ Today the question has a very reduced importance. Regulation 1/2003 replaced the centralised notification system under Regulation 17/62 by a directly applicable exception system. Only “[i]n exceptional cases where the public interest of the Community so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article [101] or Article [102] of the Treaty does not apply, with a view to clarifying the law and ensuring its consistent application throughout the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice.”⁸⁵⁸

As to Article 102 TFEU the CJEU the existence of stricter rules has been acknowledged as a common feature. See in this regard Advocate Jacob’s opinion in *Oscar Bronner*,⁸⁵⁹ where he made a stock-taking of the laws of Member States that have an approach to unilateral conduct that include a refusal to deal as an abuse of dominant position under certain

⁸⁵⁶ Article 5 of Regulation 1/2003 concerns the powers of the competition authorities of the Member States and the type of decisions they can take when applying articles 101 and 102 TFEU. The type of decisions that a national competition authority can take are:- requiring that an infringement be brought to an end;- ordering interim measures; - accepting commitments, and- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

⁸⁵⁷ For a general overview see Waelbroeck, 'L'application des règles de concurrence du Traité de Rome aux Pays-Bas'.

⁸⁵⁸ Recital 14 Regulation 1/2003. This power of finding of inapplicability shall be exercised under the conditions established by Article 10 Regulation 1/2003.

⁸⁵⁹ Opinion of Advocate General Jacobs of 28 May 1998, *Bronner*, C-7/97, EU:C:1998:264.

circumstances,⁸⁶⁰ and of those that had developed at the time the doctrine of essential facilities.⁸⁶¹

The way CJEU frames direct conflicts in EU competition laws, i.e. the pre-emption analysis, is coherent with the system of competences as established by the Treaty of Lisbon and should be retained. A direct conflict between national laws and EU laws with the same material scope is a hierarchical conflict. The primacy principle, as a rule that establishes a hierarchy when there is a vertical superposition between EU and national laws in favour of the EU law is thus an appropriate way to solve the conflict. However, primacy of EU law is also limited to the scope of the law and of the competences of the EU, i.e. conferral principle. The fact that there is a vertical superposition of competition laws cannot entail the CJEU to consider the field pre-empted. As previously seen, on the one hand, Member States did not transfer unlimited competence on competition matters to the EU. They retain full and exclusive competence over situations not affecting trade between Member States. EU law cannot be considered in conflict with national laws applicable to situations that have a national impact only and do not affect trade between Member States. This is an area of exclusive competence to the EU. On the other hand, Member States have shared legislative competence on substantive principles of EU competition law. Therefore, national competition laws can also be applicable to situations with EU relevance, i.e. that affect trade

⁸⁶⁰ This was the case in Spain, Finland, France, Greece and Portugal, Opinion of Advocate General Jacobs of 28 May 1998, *Bronner*, C-7/97, EU:C:1998:264, paragraph 53.

⁸⁶¹ Ibid: *"As regards essential facilities in particular, in some Member States specific legislative provisions prohibit enterprises which control them from unjustifiably refusing to enter contracts to supply those facilities. Such is the case in Finland in respect of the telephone network, [...] electricity transmission network [...] and postal services [...] and in Austria in respect of the rail network, [...] energy production and distribution, [...] and tramway and bus services. [...] In other Member States the notion of essential facilities has begun to develop from more general principles to require enterprises controlling such facilities not to refuse access to them without justification. In Denmark, prior to the entry into force of a new law [...] this notion was applied in respect of the port at Elseneur and the electricity transmission network in Seeland. [...] In France the notion was applied in respect of a heliport. [...] In a Spanish case concerning access to supplies of tobacco [...] substantial reference was made to the essential facilities doctrine as developed in the Commission's Decision in Sea Containers v Stena Sealink."*

between Member States, as legislative competence on competition principles is shared under the Treaty of Lisbon. If both set of national and EU competition laws can coexist, national laws cannot be said as *a priori* conflicting with EU competition law. A further analysis than a simple filed pre-emption must be undertaken. The chances for a direct vertical conflict come when the national competition law is more lenient or more restrictive than EU competition law.

Situations ought to be considered differently. More lenient competition laws conflict with EU competition law as they contradict it. Therefore, they should be set aside under the primacy principle. Stricter national competition laws do not. Stricter national competition laws do not “interfere with the proper functioning” of the EU competition laws, obstacle pre-emption does not occur. On the contrary. As stated by Monti:

“It would be hard to deny the fact that the enforcement of national competition law helps the development of the internal market. Two concrete examples among many may be offered. German law penalizes bid rigging with criminal sanctions and the relevant provisions have been applied frequently: opening up the German procurement market must serve to enhance competition across the EU, as foreign participants are more likely to compete. Second, many of the market investigations carried out by the Competition Commission [now Competition and Markets Authority] in the UK are likely to have had pro-competitive effects across the EU.”⁸⁶² (References omitted)

Stricter national competition laws cannot be considered as pre-empted by Articles 101 or 102 TFEU as this would mean to unlawfully enlarge the scope of those provisions. Stricter national competition laws foster competition in the internal market. As such, they do not affect the functioning of EU competition provisions. Therefore, there is also no “obstacle pre-emption” that could justify the incompatibility of stricter national rules. Stricter national laws shall thus remain allowed as they do not conflict with the EU competition law.

⁸⁶² Monti, 'Legislative and Executive Competence in Competition Law', 109.

3. Fundamental Rights – *Ne bis in idem*

“[T]he development of fundamental rights protection at European level — whether through the Charter of Fundamental Rights or accession to the ECHR [European Convention of Human Rights] — should not lead to any distortions in the finely calibrated system of competences on which the EU is founded and which characterises its relationship with the Member States.”⁸⁶³ Under Article 2 TEU the respect for human rights is one of the values on which the EU is founded. In the absence of an express reference to human rights in the Treaty of Rome, they have made their way into the EU legal order as “general principles of EU law.”⁸⁶⁴ Today, however, the “Treaties not only refer to fundamental rights as laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms [the “Convention”], and resulting from the constitutional traditions common to the Member States, but also directly recognize the value as primary law of the Charter of Fundamental Rights of the European Union [the “Charter”] (Article 6(1) and (3) TEU).”⁸⁶⁵ Member States and the EU bodies must respect fundamental rights when they are implementing EU law.⁸⁶⁶

One of the fundamental rights that finds formal formulation both in the Convention and in the Charter and that may have an impact in power distribution in the EU is the *ne bis in idem* principle.⁸⁶⁷

Article 4(1) of Protocol (No 7) to the European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

⁸⁶³ View of Advocate General Kokott of 13 June 2014, *Adhésion de l'Union à la CEDH, Opinion procedure 2/13*, EU:C:2014:2475, paragraph 34.

⁸⁶⁴ Judgment of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-11/70, EU:C:1970:114.

⁸⁶⁵ Lenaerts and others, *European Union Law*, 826.

⁸⁶⁶ Article 51 of the Charter of Fundamental Rights of the European Union.

⁸⁶⁷ For a general view on the application of *ne bis in idem* in the area of competition see Renato Nazzini, 'Fundamental rights beyond legal positivism: rethinking the *ne bis in idem* principle in EU competition law' (2014) 2 *Journal of antitrust enforcement* ; Wouter P.J. Wils, 'The Principle of *Ne Bis in Idem* in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 *World Competition* .

“No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.”

Under Article 50 of the Charter of Fundamental Rights of the European Union:

“No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance to the law.”

This provision is said to “correspond to Article 4 of Protocol No 7 to the [Convention], but its scope is extended to European Union level between the Courts of the Member States.”⁸⁶⁸ “In accordance with Article 50, the ‘non bis in idem’ principle applies not only within the jurisdiction of one State, but also between jurisdictions of several Member States.”⁸⁶⁹ The powers of the national competition authorities and the Commission to impose fines are criminal in nature for the purpose of the *ne bis in idem* principle.⁸⁷⁰ The main element for the application of the *ne bis in idem* is therefore the definition of what is considered to be the “same offence.”

Some commentators read the principle of *ne bis in idem* as a limit to the parallel application of national and EU competition laws and for the same facts being investigated in parallel by several national competition authorities under national and EU competition laws.⁸⁷¹ This is

⁸⁶⁸ Council of the EU, *Charter of Fundamental Rights of the European Union – Explanations relating to the complete text of the Charter*, December 2000, available at:

http://www.europarl.europa.eu/charter/pdf/04473_en.pdf

⁸⁶⁹ Council of the EU, *Charter of Fundamental Rights of the European Union – Explanations relating to the complete text of the Charter*, December 2000, p. 76.

⁸⁷⁰ Administrative proceedings under EU law are considered criminal for the purposes of Art 6 of the ECHR: Judgment of 8 July 1999, *Montecatini v Commission*, C-235/92P, EU:C:1999:362, paragraphs 175-176. In principle, the same applies to proceedings in the Member States: see eg in the United Kingdom *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* (Napp No 3) [2001] Comp AR 33, [2002] ECC 3, paragraphs 68-76; *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* (Napp No 4) [2002] ECC 13, paragraphs 98-103, and, in Italy *A. Menarini Diagnostics S.r.l. v. Italy*, App. No 43509/08 (ECHR, 27 September 2011); Opinion of Advocate General Van Gerven of 8 November 1989, *Raab v Hauptzollamt Berlin-Packhof*, C-1/89, EU:C:1989:648, paragraph 31, and Judgment of 8 July 1999, *Hüls v Commission*, C-199/92 P, EU:C:1989:648, paragraphs 149 and 150. See also Koen Lenaerts and Jan Vanhamme, 'Procedural Rights of private parties in the community administrative process ' (1997) 34 Common Market Law Review , 557.

⁸⁷¹ Wils, 'The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis'; Nazzini, 'Fundamental rights beyond legal positivism: rethinking the ne bis in idem principle in EU competition law'; Wouter Devroe, 'Limits of differentiation in European economic law: ne bis in idem

because under Regulation 1/2003 it is possible that an infringement is prosecuted by a national competition authority or several National Authorities in parallel under national and EU competition laws or that the Commission starts an investigation after national investigations to the same facts under national laws.⁸⁷² The CJEU has a different approach and considers that the parallel application of national and EU competition laws is not incompatible with the principle of *ne bis in idem*. In *Walt Wilhelm* one of the questions referred to the CJEU by the German court touched this precise point,

*“whether the risk of its resulting on a double sanction imposed by the Commission and by the national authorities renders impossible the acceptance for one set of facts of facts being subject to parallel procedures, one at the Community level another one at the national level.”*⁸⁷³

In analysing this issue, the CJEU used a three-test step: the identity of fact, unity of offender and unity of the legal interest protected.⁸⁷⁴ The CJEU ruled out the applicability of the *ne bis in idem* principle in the case of parallel application of EU and national competition laws for lack of unity of the legal interests protected. The CJEU held that “community and national law on cartels consider cartels from different points of view”,⁸⁷⁵ and that “the acceptability of a dual procedure (...) follows in fact from the special system of the sharing of jurisdiction between the Community and the Member States.”⁸⁷⁶ The CJEU nevertheless added that if the two parallel procedures lead to consecutive sanctions “[a] general requirement of

and minimum versus maximum harmonisation’ (2009) 16 Maastricht journal of European and comparative law .

⁸⁷² Paragraph 5, Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C 101/43.

⁸⁷³ Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4, paragraph 10.

⁸⁷⁴ Judgment of 7 January 2004, *Aalborg Portland and Others v Commission*, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, C-204/00 P, EU:C:2004:6, paragraph 338.

⁸⁷⁵ Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4 paragraph 3.

⁸⁷⁶ *Ibid*, paragraph 11.

natural justice (...) demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed.”⁸⁷⁷

Some authors consider that the CJEU’s approach to the principle of *ne bis in idem* in competition matters is incompatible with the approach of the European Court of Human Rights (ECtHR) and that, as such it is difficult to avoid the application of Article 50 of the Charter.⁸⁷⁸ In *Franz Fischer v Austria* the European Court of Human Rights considered that the *ne bis in idem* principle is not only breached when a person is tried or punished twice for nominally the same offence but also when this person is prosecuted twice for two offences, the essential elements of which overlap.⁸⁷⁹ The judgement also confirms that a violation of the principle of *ne bis in idem* cannot be avoided by reducing the amount of the second punishment by the amount of the first punishment.⁸⁸⁰

Devroe and Nazzini also argue the use of this three-fold test by the CJEU for assessing the existence of the same offense and the consequent application of the *ne bis in idem* principle is specific to the field of competition and should be abandoned.⁸⁸¹ They find support in the opinion of Advocate General Kokkot in *Toshiba*,⁸⁸² a preliminary ruling where the CJEU was called to analyse a question corresponding in essence to “[h]ow many competition authorities in Europe may deal with one and the same cartel and impose penalties on the participating undertakings?”⁸⁸³

⁸⁷⁷ Ibid. See also Wils, 'The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis'.

⁸⁷⁸ Devroe, 'Limits of differentiation in European economic law: ne bis in idem and minimum versus maximum harmonisation'; Nazzini, 'Fundamental rights beyond legal positivism: rethinking the ne bis in idem principle in EU competition law'.

⁸⁷⁹ *Franz Fischer v Austria*, App. No 37950/97 (ECHR, 29 May 2001).

⁸⁸⁰ Ibid. See also Wils, 'The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis'.

⁸⁸¹ Devroe, 'Limits of differentiation in European economic law: ne bis in idem and minimum versus maximum harmonisation'; Nazzini, 'Fundamental rights beyond legal positivism: rethinking the ne bis in idem principle in EU competition law'.

⁸⁸² Opinion of Advocate General Kokott of 8 September 2011, *Toshiba Corporation e.a*, C-17/10, EU:C:2011:552

⁸⁸³ Ibid, para 1.

She pointed out that the CJEU does not apply the third criteria of the “unity of the legal interest protected” in other areas of law. For example, the CJEU has considered it irrelevant in the context of the rules governing the area of freedom security and justice,⁸⁸⁴ and the European arrest warrant.⁸⁸⁵ In such circumstances, AG Kokkot considered that the CJEU “has consistently held that the only relevant criterion is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together.”⁸⁸⁶ AG Kokkot argues that “there is no objective reason why the conditions to which the principle of *ne bis in idem* in the EU legal order is subject in competition matters should be any different from those applicable to it elsewhere.”⁸⁸⁷ She argues that the different application of the *ne bis in idem* principle in the EU legal order depending on the area of law is “*detrimental to the unity of the EU legal order*”⁸⁸⁸ and, as it enjoys now the status of a fundamental right under Article 50 of the Charter of Fundamental Rights, “the same criteria should apply in all areas of EU law.”⁸⁸⁹ Finally, she points out the impact of *ne bis in idem* on the uniformity of competition rules, by stating that in the same way that the principle *ne bis in idem*:

*“serves to guarantee the free movement of EU citizens in EU territory as a ‘single area of freedom, security and justice,’ in the field of competition law, it helps to improve and facilitate the business activities of undertakings in the internal market and, ultimately, to create uniform conditions of competition (a ‘level playing field’) throughout the EEA.”*⁸⁹⁰

On the same grounds, Nazzini argues that:

⁸⁸⁴ Article 54 of the Convention implementing the Schengen Agreement (‘CISA’) signed in Schengen on 19 June 1990 (OJ 2000 L 239, p. 19).

⁸⁸⁵ Council Framework Decision 2002/584/JHA of June 13, 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

⁸⁸⁶ Opinion of Advocate General Kokott of 8 September 2011, *Toshiba Corporation e.a*, C-17/10, EU:C:2011:552, paragraph 116.

⁸⁸⁷ *Ibid*, paragraph 118.

⁸⁸⁸ *Ibid*, paragraph 117.

⁸⁸⁹ *Ibid*.

⁸⁹⁰ *Ibid*, paragraph 118.

“the Court of Justice's approach in competition cases results in a market fragmentation which in other areas the Court itself always rejects as incompatible with the internal market.”⁸⁹¹

He observes that Article 4(1) of Protocol (No 7) to the Convention limits the *ne bis in idem* to the jurisdiction of a single State. Article 50 of the Charter extends its effects to the entire area of the EU. *Ne bis in idem* under Article 50 of the Charter has thus an extra-territorial effect. By requiring the “unity of the legal interest protected”, the CJEU is denying the viability of the *ne bis in idem* principle to be applicable in competition cases at the expense of the unity of the internal market.⁸⁹² Prechal also argues that *[t]he establishment and proper functioning of the internal market as one single market requires a system of common rules and principles which safeguards its unity. Any unilateral interference with these rules by the Member States or other actors has to be excluded.*⁸⁹³

However, the CJEU in *Toshiba*, a ruling by the *Grand Chamber*, contrary to the opinion of the AG Kokkot, reaffirmed the validity of the three-fold approach to assess the applicability of the *ne bis in idem* principle in the area of competition.⁸⁹⁴ The CJEU's approach to *ne bis in idem* in the area of competition protects the application of national competition and regulatory laws. This is because “*the legal interest protected changes when considered from the perspective of different sovereign States,*”⁸⁹⁵ and therefore, *ne bis in idem* is ruled out. As such diversity is favoured. As observed by Nazzini,

“[t]he requirement of the identity of the legal interest protected comes into play to rule out the application of the ne bis in idem principle to offences committed by the same person and arising out of the same facts

⁸⁹¹ Nazzini, 'Fundamental rights beyond legal positivism: rethinking the *ne bis in idem* principle in EU competition law', 286.

⁸⁹² Ibid, 284-287.

⁸⁹³ Sacha Prechal, 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union' in Catherine Bernard (ed), *The fundamentals of EU law revisited: Assessing the Impact of the Constitutional Debate* (Oxford University Press 2007); Jan H. Jans and Jolande M. Prinssen, 'Direct Effect: Convergence or Divergence?' in Jolande M. Prinssen and Annette Schrauwen (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (Europa Law Publishing 2004).

⁸⁹⁴ Judgment of 14 February 2012, *Toshiba Corporation e.a*, C-17/10, EU:C:2012:72, paragraphs 93 to 103.

⁸⁹⁵ Nazzini, 'Fundamental rights beyond legal positivism: rethinking the *ne bis in idem* principle in EU competition law', 286.

in different legal systems, as different legal systems are assumed to protect competition within their own national markets,⁸⁹⁶ or to offences committed in violation of rules aimed at achieving different regulatory or policy objectives, such as, for example, competition rules, on the one hand, and rules in the areas of tele-communications regulation⁸⁹⁷ or patent law,⁸⁹⁸ on the other.”⁸⁹⁹ (References from the original)

I agree with the approach of the CJEU and argue that a change of the three-step test to a two-step test under which the “unity of the legal interest protected” is not possible under Article 6(1) TEU, as it changes the system of competences of the EU.

In accordance with the second sentence of Article 6(1) TEU:

“The provisions of the Charter [of Fundamental Rights of the European Union] shall not extend in any way the competences of the Union as defined in the Treaties.”

Ultimately, the aim of prohibiting the extension of the competences of the EU is to safeguard the principle of conferral.⁹⁰⁰

It has been previously submitted that the competence to legislate on substantive principles of EU competition law and the competence to enforce Articles 101 and 102 TFEU is shared. Furthermore, under Article 104 TFEU and Article 3(1) Regulation 1/2003, Member States must apply national competition laws in parallel with EU competition law. A change of the test of *ne bis in idem* regarding EU competition law will imply the exclusion of one sphere of

⁸⁹⁶ Judgement of 24 September 2006, *van Straaten*, C-150/05, EU:C:2006:614.

⁸⁹⁷ Undertakings may be subject to telecommunications regulation as well as competition law: see eg. Judgement of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraphs 56-110, where the applicant argued that the relevant telecommunications regulation did not leave it any scope for determining its competitive conduct autonomously and that its compliance with telecommunications regulation gave rise to a legitimate expectation that there was no breach of Article 102 TFEU in the circumstances. Conversely, if national regulatory authorities had sanctioned the applicant for conduct that also amounted to margin squeeze, a *ne bis in idem* issue could have arisen.

⁸⁹⁸ See e.g. Judgement of 6 December 2012, *AstraZeneca v Commission*, C-457/10 P, EU:C:2012:770, paragraphs 74 to 100, where the dominant undertaking could in theory have been exposed to fines under national law for providing false or misleading information to patent offices, a conduct that was also found to be an infringement of Article 102.

⁸⁹⁹ Nazzini, 'Fundamental rights beyond legal positivism: rethinking the *ne bis in idem* principle in EU competition law', 284.

⁹⁰⁰ View of Advocate General Kokott of 13 June 2014, *Adhésion de l'Union à la CEDH*, *Opinion procedure 2/13*, EU:C:2014:2475, paragraph 45.

competence as only one set of competition laws could be applicable. As Member States cannot apply national competition laws to practices that are prohibited under Article 101 and 102 TFEU without applying EU competition law,⁹⁰¹ the sphere of competence excluded would be the national one. EU competition law would be the only one applicable in the internal market. This is an extension to the competences of the EU as defined in the Treaties and therefore prohibited under Article 6(1) TFEU.

The impact of the principle of *ne bis in idem* that does not take into consideration the “unity of the legal interest protected”, in the competence of the EU in the area of competition policy as defined by the Treaties is confirmed by the Advocate General Kokott in her view in the Opinion procedure 2/13 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁹⁰² She considered however, that no changes would occur as “the draft agreement does not even cover Protocol No 7 to the [Convention]. Thus the EU will not, by virtue of its accession to the [Convention], assume any obligations under international law as regards *ne bis in idem*. It follows that there would be no need to take action in relation to *ne bis in idem* in the light of the accession to the [Convention] that is currently proposed even if — contrary to my view — the assumption was made that at present the conception of this legal principle in EU competition law does not (yet) fully correspond to that applied by the ECtHR in criminal cases.”

The parallel application of national competition laws and the EU competition rules is not excluded by the *ne bis in idem* principle.

⁹⁰¹ Article 3(1) Regulation 1/2003.

⁹⁰²View of Advocate General Kokott of 13 June 2014, *Adhésion de l’Union à la CEDH, Opinion procedure 2/13*, EU:C:2014:2475.

Conclusion

Despite the constitutional arrangements in the competition field allowing action both by the Member States and by the Union as shown above, it could be argued that diversity in EU competition law would be excluded by general principles of EU law of direct effect, primacy and *Ne bis in idem*. However, a close analysis of these principles under the case law of the CJEU undertaken in this chapter allows us to reach a different conclusion though.

The direct effect of the Treaty's competition provisions does not exclude discretion of the Member States to set priorities in the enforcement of Articles 101 and 102 TFEU. Different approaches to EU competition law can take place depending on the priorities set to its enforcement. Moreover, diversity is not contrary to the justiciability of these provisions by the CJEU. Therefore, the balance between competition and other public interests may vary at the Member States' level.

Finally, when it comes to the primacy of EU competition law over national laws, the way the CJEU adjudicates conflicts, allows divergent national competition rules to exist. This conclusion is not jeopardised by the principle of *ne bis in idem* as protected under the Treaties, since that principle cannot itself impose a centralised system of EU competition law enforcement.

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Chapter 6 - Conclusions: Analysing reality without a magnifying glass - The case for diversity in EU competition law

This thesis asks the question whether diversity in EU competition law is possible from a constitutional point of view?

In 1962 the CJEU declared the direct effect of EU competition provisions, and in 1969 their supremacy, over national laws. The Treaty of Lisbon declared the competence to establish the competition rules necessary for the functioning of the internal market as exclusive to the EU, from 1 December 2009. On this ground, the literature assumes that under the Treaty of Lisbon, the competence as regards EU competition law is exclusive to the Union, even if some authors have criticised this choice. Diversity in EU competition law would be excluded *lex lata*, as where a competence is exclusive to the EU, only the EU can legislate and adopt legally binding acts, Member States being able to do so themselves only if empowered by the Union or when implementing Union's acts. Moreover, the majority of the literature also considers that any chance of diversity in EU competition law would in any case be excluded by the general principles of direct effect and primacy of EU competition law, as they require a uniform implementation of the EU law, or by the principle of *ne bis in idem* that prevents the simultaneous application of national and EU competition law.

This thesis however, has reached a radically different conclusion. This thesis concludes that the competence to legislate on substantive principles of EU competition law is shared under the Treaties and so is the competence to enforce EU competition law. It also showed that diversity is not anathema to direct effect and the primacy of EU competition law, or in any way excluded by the principle of *ne bis in idem*. These conclusions are grounded in two major blocks: first a close analysis of the system of competences introduced by the Treaty of Lisbon

and second a close analysis of the relevant general principles of EU law in the light of the case law.

Section 1 of this conclusions sums up the main findings of the thesis, the constitutional grounds and the practical implications. The following sections put forward four axes of action that can be taken to stimulate diversity in EU competition law without the need the change the Treaties.

Section 2 explores unlawful bottlenecks to achieve diversity introduced by Regulation 1/2203 and that should be removed. Such is the case of Article 3(1), which establishes a prohibition for stricter national competition rules on agreements, concerted practices and decision of association of undertakings. Such is also the case of Article 5 of that Regulation, which precludes national competition authorities from determining that there is no violation of Article 101 and 102 TFEU.

Next, Section 3 identifies potential bottlenecks to achieve diversity that should be avoided and insists that future EU legislation on substantive principles of EU law be adopted on the correct legal basis: article 352 TFEU, and not article 114 TFEU as wrongly proposed by the Commission on its recent proposal for a Directive to empowered Member States to be more effective enforcers, also known as the ECN+ Directive. Article 352 TFEU requires unanimity whereas article 114 TFEU only requires a qualified majority. The former protects diversity more as it gives Member States a veto power.

Section 4 presents a set of proposals to reform coordination among national competition authorities and the Commission to enforce EU competition rules, replacing the Commission's vertical coordination in the European Competition Network by multilateral coordination at the Advisory Committee on Restrictive Practices and Abuse of Dominance Level.

Finally, Section 5 puts forward two radical measures that can always be taken to achieve diversity in EU Competition law: the use of Article 20 TEU to develop EU competition law and policy and the suspension or the abolition of Regulation 1/2003.

1. The constitutional grounds for diversity in EU competition law

EU law in general, and EU competition law in particular are riddle with conflictual dynamics. Townley identified the regulatory challenges that potentiate conflicts in EU competition law and policy. In brief, Member States have different views on harnessing or controlling the functioning of markets and market power and so does the EU. This may require different standards under competition law. Also, different Member States and the EU may value the public interest differently. This has an impact on how the balance between competition and other public policy considerations is made. Even if there is agreement on the value of a public interest, Member States and the EU may wish to address the issue in different ways. Furthermore, the way competence is allocated in the EU may require the intervention of a plurality of legal sources located at different levels, making contradictory demands. Finally, the fundamental transformation of business models – including the digital economy – requires an increasingly complex analysis that may give rise to conflicting solutions on the enforcement of EU competition law. In the eventuality of a conflict in EU competition law the constitutional issue is whether a uniform solution across the EU is required, or whether different solutions at national level are possible or, to a certain extent via different interpretations of EU law. This will depend on how the competence between the EU and the Member States in the field of competition is allocated (first building block) as well any limits the general principles of EU law may impose in the implementation of EU competition law (second building block).

First building block – The system of competences introduced by the Treaty of Lisbon

The key question in the field of competition law is whether the competence in this sphere has in fact become exclusive to the Union under article 3(1)(b) TFEU. A close analysis to the system of competences introduced by the Treaty of Lisbon reveals that Article 3(1)(b) TFEU excludes more from the scope of the EU exclusive competence in EU competition law than it includes. This Article limits the conferral of competences to the Union in competition law to what is necessary for the functioning of the internal market. Member States remain solely competent to establish competition rules applicable to situations that affect the national territory only, as per article 4(1) TEU. Furthermore, Article 3(1)(b) TFEU concerns legislative competence only, as it refers to the competence to establish rules. The executive power to enforce those rules is shared under Article 105 TFEU as per Article 4(1) TFEU. Finally, Article 2(1) TFEU requires that the scope and the arrangements for exercising a competence are determined by the legal bases established by the Treaties related to each area. In the case of EU competition law applicable to undertakings, the relevant legal bases are Articles 103, 105(3) and 106(3) TFEU. None of them allows the EU to establish substantive principles of EU competition law. These articles concern the implementation of Articles 101, 102 and 106 TFEU that are directly applicable. As such, implementing acts, even if of a legislative nature, cannot and do not determine the content of those provisions. The competence to establish substantive principles of EU competition law is conferred to the Union by Protocol (No. 27) on the internal market and competition law which in turn establishes Article 352 as the enabling legal basis for the Union to act. It is therefore a shared competence, exerciseable by the EU under an unanimity vote at the Council which protects the position of the Member States very much. This means that in case of conflict in EU competition law and policy, the answer depends on who is competent to act.

For example, the diversified approach to OTA parity clauses in the Booking.com cases explored above⁹⁰³, despite the criticism it raised in the literature due to the lack of harmonised enforcement of EU competition law at national level, is well founded on constitutional grounds. Such a diversified approach would also be possible regarding domestic MIFs of Visa and Mastercard discussed above, would national competition authorities have opted to do it considering the specificities of the national markets.

Under the system of competences established by the Treaty of Lisbon, the Commission has no special standing vis-à-vis the Member States when it comes to the implementation of EU competition rules. The executive competence to enforce EU competition law remains shared and so does the legislative competence to establish substantive principles of EU competition law. Therefore, national competition authorities enforce EU competition law in their own right and not mandated by the Commission. They interpret EU competition rules according to the facts that they are called to analyse and within the limits set by the jurisprudence of the CJEU, that is the ultimate interpreter of EU law. In the same sense, going back to the MIFs case discussed above,⁹⁰⁴ a diversified enforcement of Article 101 TFEU regarding domestic MIFs deemed necessary to safeguard competition in different national realities, e.g. Portugal, was also possible. National competition authorities could have achieved a different conclusion regarding the compatibility of the level of domestic MIFs under Article 101 TFEU, depending on the different national markets realities.

Also, and for the same reasons, when it comes to the balance of competition against other public interest considerations, Member States may diverge on their approach. *Wouters* remains valid under the Treaty of Lisbon. We have seen that the EU Treaties are incomplete contracts in the sense that they do not provide a solution for the whole myriad of conflicts

⁹⁰³ See Preamble.

⁹⁰⁴ See Preamble.

that may take place in their implementation.⁹⁰⁵ Also, at national level, it can be necessary to balance national public interests with EU competition law. In *Wouters* the regulation adopted by the Netherland Bar Association prevented multidisciplinary partnership between lawyers and accountants. This was considered necessary to ensure the professional rules of the bar were respected and the lawyers remain independent and able to observe professional secrecy. The CJEU ruled that the regulation in question was a decision of undertakings for the purpose of applying Article 101 TFEU and restricted competition. However it considered that the restrictive effects of such regulation should be considered in the light of the objectives of the regulation in question (the integrity of the administration of justice) and “whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.”⁹⁰⁶

Second building block: the limits to diversity imposed by the general principles of EU law of direct effect, primacy and *ne bis in idem*

The second building block of the thesis examines three general principles of EU law - direct effect, primacy and *ne bis in idem* - and concludes that a close reading of the CJEU case law shows that none of them excludes diversity in EU competition law.

The CJEU confirmed the direct effect and primacy of EU competition law in early case law. Some authors consider that diversity would be excluded by the direct effect of the EU competition provisions as no discretion in the implementation of a self-executing norm is possible under the *Van Gend en Loos* test.⁹⁰⁷ Therefore, it is said that there is no margin for different interpretations of EU competition law or a different balance of competition against other public interest considerations. These authors however seem to ignore the fact that the

⁹⁰⁵ The CJEU has regularly held that EU competition rules must be interpreted in the wider structure of the Treaties. E.g. Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4 and Judgment of 21 February 1973, *DEPE - Europemballage Corporation and Continental Can Company v Commission*, Case 6/72, ECLI:EU:C:1973:22, paragraphs 244 and 245.

⁹⁰⁶ Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4, paragraph 97.

⁹⁰⁷ See the discussion in Section 1, Chapter 5, above.

genesis of the direct effect of EU competition law is not the same as the one in *Van Gend en Loos* and does not relate to the content of the norms. When the CJEU recognised in *Bosch* the direct effect of EU competition law, it also recognised that the system of enforcement established under the Treaty was not of the nature to ensure a complete and consistent application of Article 101 TFEU. Nevertheless, that was not a reason not to recognise the direct effect of that norm. In any case, direct effect does not exclude the discretion to establish enforcement priorities. This allows diversity, as priorities can be related to the content of the norm directly. The divergence between the Bundeskartellamt and the Commission in the priorities for the enforcement of Article 102 TFEU are a good example. The prioritisation of the enforcement in relation to infringements that have an impact on consumer welfare, or the prioritisation of those cases that harm the competitive process instead, may lead to different approaches to Article 102 TFEU in cases such as predatory prices, for example. In any case, diversity is not against the justiciability of EU competition law, which is the ultimate test for direct effect. A different balance of public interest considerations by the Member States in EU competition law, such as within Article 101(3) TFEU is therefore possible, as recently confirmed by the CJEU in *Ordem os Tecnicos Oficiais de Contas*.⁹⁰⁸

Turning now to the primacy of EU competition law, the relevant question is: when is a national law inconsistent with a EU norm?⁹⁰⁹ Constitutionalists refer to this question as “the problem of pre-emption.”⁹¹⁰ When is national law pre-empted by the EU law? This depends on how conflicts between national and EU competition law are framed by the CJEU. This, in

⁹⁰⁸ Judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127

⁹⁰⁹ See the discussion in Section 2, Chapter 5, above.

⁹¹⁰ Arena, 'The Doctrine of Union Preemption in the EU Single Market: Between Sein and Sollen'; Cross, 'Pre-emption of Member State Law in the European Economic Community: A framework for analysis'; Schütze, 'Supremacy without pre-emption? The very slow emergent doctrine of Community pre-emption'; Soares, 'Pre-emption, conflicts of powers and subsidiarity'; Waelbroeck, 'The emergent doctrine of Community pre-emption – Consent and delegation'; Weiler, 'Community system: The dual character of supranationalism'.

turn, has an impact on the degree of diversity allowed in EU competition law, as under the primacy principles only national conflicting norms should be precluded by EU law. A close analysis of the case law allows us to conclude that the CJEU has correctly rejected a field pre-emption theory in competition law, since *Walt Wilhelm*⁹¹¹ confirms that there is room for simultaneous application of national and EU competition laws. Furthermore, when it comes to direct conflicts between EU and national laws the CJEU has correctly considered that stricter national competition laws are not in conflict with EU competition laws. Finally, where the Member States have not transferred competence to the Union in specific field, such as for example in the field of culture, to set aside national laws on the grounds of primacy of EU competition law could be contrary to the principle of conferral.⁹¹²

As regards the principle of *ne bis in idem* consecrated in Article 50 of the Charter of Fundamental Rights of the European Union, some authors read it as a limit to the parallel application of national and EU competition law, as it corresponds to double jeopardy. This thesis submits that this reading of the *ne bis in idem* principle is contrary to the principle of conferral and to article 6 (1) TEU since it would mean excluding national competence and the consequent extension of EU competence in competition matters. Parallel application of both sets of norms remains possible.

2. Unlawful bottlenecks to achieving diversity

There are several provisions in Regulation 1/2003 that are unlawful bottlenecks to achieving diversity and must be removed.

⁹¹¹ Judgment of 13 February 1969, *Walt Wilhelm and Others v Bundeskartellamt*, Case 14/68, EU:C:1969:4.

⁹¹² Monti, 'Article 81 EC and Public Policy'; Schmid, 'Diagonal Competence Conflicts between European Competition Law and National Regulation – A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing'.

Article 3(2) Regulation 1/2003

Article 3 Regulation 1/2003 concerns “The relation between the EU and national laws” and paragraph 2, Article 3 of Regulation 1/2003 provides the following:

“The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article [101](1) of the Treaty, or which fulfil the conditions of Article [101](3) of the Treaty or which are covered by a Regulation for the application of Article [101](3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.”

This paragraph has two contrasting rules regarding the interplay between national and EU competition law. It accepts stricter national rules on unilateral conducts while excluding the same possibility in respect of agreements, decisions of undertakings or concerted practices within the meaning of Article 101 TFEU.

Whereas 8 of the Regulation 1/2003 justify the need for contrasting rules as follows:

“(…) In order to create a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Article [103](2)(e) of the Treaty the relationship between national laws and Community competition law. To that effect it is necessary to provide that the application of national competition laws to agreements, decisions or concerted practices within the meaning of Article 81(1) of the Treaty may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under Community competition law. The notions of agreements, decisions and concerted practices are autonomous concepts of Community competition law covering the coordination of behaviour of undertakings on the market as interpreted by the Community Courts. Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. (...)”

It has been established that, given the direct effect of Articles 101 and 102 TFEU, the Council has no power to determine the content of the competition principles established by Articles 101 and 102 TFEU. It is bounded by the interpretation of the CJEU, that is the ultimate

interpreter of EU law. Further, the relation between those provisions and national competition law is determined by the primacy principle. It has been demonstrated in more detail that stricter national competition laws are not in conflict with EU competition laws. We have seen that when it comes to vertical conflicts, there is a conflict between a national law and the competition rules of the Treaty where the national law imposes a stricter standard than the one established by Article 101 TFEU. As such, stricter competition rules on agreements, concerted practices and decision of association of undertakings are not excluded by the primacy of EU competition law. Article 3(2) Regulation 1/2003 however excludes the application of stricter competition rules to situations falling within Article 101 TFEU. This amounts to an enlargement of the scope of Article 101 TFEU with the creation of a new competition law principle and harmonisation of national laws: all the agreements, concerted practices and decision of association of undertakings that are not prohibited under EU competition law are allowed in the internal market. By determining that stricter national competition rules, that are compatible with the EU law, cannot be applicable to agreements, decision of associations and concerted practices that affect trade between Member States but are not covered by the prohibition of Article 101(1) TFEU, the Council is enlarging the scope of this prohibition. This is a misuse of powers under Article 103 TFEU, as it corresponds, in substance to an amendment of the Treaty without following the procedures which it provides for that purpose.⁹¹³

Articles 101 and 102 TFEU are EU primary law. As such, a change of their scope requires a Treaty's amendment. Article 352 TFEU, that serves as the legal basis for the EU to enact substantive principles of EU competition law could also not be used.

⁹¹³ Opinion of the Court of 28 March 1996, *Adhésion de la Communauté à la CEDH*, Opinion 2/94, EU:C:1996:140 paragraph 30. See also Declaration (No 42) annexed to the Lisbon Treaty on Article 352 on the Treaty of the Functioning of the European Union [2010] OJ C83/351.

Moreover, under the subsidiarity principle, it is questionable that there is a need for harmonised competition rules on agreements, restrictive practices and decision of association of undertakings. Divergence as regards unilateral conduct is allowed, which means that business will keep facing non-harmonised competition rules in the internal market. Furthermore, stricter national competition rules on agreements, restrictive practices and decisions of undertakings do not endanger, on the contrary, they contribute, for “ensuring that competition is not distorted [in the single market].”⁹¹⁴

Article 3 of Regulation 1/2003 should be annulled as it was adopted under the wrong legal basis – that of Article 103(1)(e), and no future harmonisation of national competition laws on agreements, restrictive practices and decision of undertakings seems justified.

Article 5 Regulation 1/2003 and Article 3(1) TFEU

Article 5 Regulation 1/2003 establishes the power of the competition authorities of the Member States as follows:

“The competition authorities of the Member States shall have the power to apply Articles [101] and [102] of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

- requiring that an infringement be brought to an end,*
- ordering interim measures,*
- accepting commitments,*
- imposing fines, periodic penalty payments or any other penalty provided for in their national law.*

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.”

Under this provision, national competition authorities are precluded from the power to determine that there is no violation of Articles 101 and 102 TFEU. This is because “[a]ccording to the second paragraph of Article 5 of the Regulation, where on the basis of the information

⁹¹⁴ Protocol (No 27) on the internal market and competition.

in their possession the conditions for prohibition are not met, the national competition authorities may decide that there are no grounds for action on their part.”⁹¹⁵ This is “corroborated by the determination of the Commission’s decision-making power where there has been no breach of Articles 101 TFEU and 102 TFEU. According to Article 10 of the Regulation, the Commission may by decision find that Articles [101 TFEU] and [102 TFEU] are not applicable.”⁹¹⁶

It has been established that competence to enforce Articles 101 and 102 TFEU is shared. It has also been established that there is a preference for action to be taken at the Member States’ level under the subsidiarity principle that remains applicable to EU executive acts. The limitation of the national competition authorities’ powers may have a significant impact on diversity in EU law and legal certainty of the parties. This is particularly true as regards the enforcement of Article 101(3) TFEU. The argument that the limitation of national competition powers is necessary to guarantee a uniform application of EU competition law is not compelling. Different weights of public policy within Article 101 TFEU are accepted. Also, stricter national competition rules on cartels, restrictive practices and decision of undertakings are allowed by the EU legal order. Therefore, allowing national competition authorities to determine that there is no violation of Articles 101 and 102 TFEU would not only respect the scheme of competences under the Treaties more as well as it would also be more in accordance with the principle that decisions shall be taken as closely as possible to the citizens in accordance with the principle of subsidiarity.

The impossibility to determine that there has been no violation of Articles 101 and 102 TFEU also has another serious consequence on the powers of Member States with impact on the degree of diversity allowed in EU competition law. It precludes Member States from

⁹¹⁵ Judgment of 3 May 2011, *Tele2 Polska*, C-375/09, EU:C:2011:270, paragraph 22.

⁹¹⁶ *Ibid*, paragraph 24.

enforcing stricter national competition laws on agreements, concerted practices and decision of undertakings. This is because, under Article 3(1) Regulation 1/2003:

“[w]here the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101](1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101] of the Treaty to such agreements, decisions or concerted practices.”

Under Article 5 of the Regulation, national authorities are limited to “decide that there are no grounds for action on their part” if they consider that the conditions for prohibition under Article 101 TFEU are not met. They cannot take a decision under Article 101 TFEU. Consequently, they also cannot enforce national competition laws, even if, under national competition laws the agreement, restrictive practice or decision of association of undertakings would be considered unlawful. This is against the principle of conferral. We have seen that stricter national competition laws are not in conflict with EU competition law. The limitation of national competition authorities’ power under Article 5 Regulation 1/2003 read in conjunction with Article 3(1) of that Regulation amounts to a *de facto* enlargement of the scope of Article 101 TFEU as it sets aside the possibility for the Member States to enforce stricter national laws. In the same terms, this is a violation of the principle of conferral. This does not apply in regard to abuse of dominance, as Article 3(1) Regulation 1/2003 safeguards the power of the Member States to enforce stricter national rules on unilateral conduct:

“(…) Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.”

3. Potential bottlenecks to achieving diversity

Future bottlenecks to achieving diversity can be avoided if legislative initiatives are grounded on the correct legal basis. The legal basis will determine the arrangements for the exercise

of EU competence. It has been submitted that, depending on the type of arrangements for the exercise of competence, the capacity of the Member States to influence a final result in a way that accommodates divergent views, varies. A legal basis that requires an act to be adopted by unanimity at the Council respects diversity more than a legal basis that requires a vote by qualified majority. Unanimity gives a veto power to every Member State, making an action at EU level less likely. It also gives the bargaining power to the Member States to introduce exceptions and safeguards to their divergent views.

On 22 March 2017, the Commission presented a proposal for a Directive of the European Parliament and of the Council⁹¹⁷ intended to empower Member States' competition authorities to be more effective enforcers, also known as "ECN+". The Commission proposed a double legal basis for the Directive: Articles 103 and 114 TFEU. To justify its choice, the Commission indicated that:

*"The current proposal is based on both Articles 103 and 114 TFEU because it pursues a number of goals which are inextricably linked, named to: (1) give effect to the principles set out in Articles 101 and 102 TFEU by empowering NCAs to be more effective enforcers; (2) ensure that competition in the internal market is not distorted and consumers and undertakings are not put at a disadvantage by national laws and measures which prevent NCAs from being effective enforcers; (3) ensure that the same guarantees and instruments are in place for national competition law when it is applied in parallel to Articles 101 and 103 TFEU to ensure legal certainty and a level playing field; and (4) put in place effective rules on mutual assistance to safeguard the smooth functioning of the internal market and the system of close cooperation within the ECN".*⁹¹⁸

The Commission justifies the need to use Article 103 TFEU as

*"[e]nsuring that the NCAs have the means and instruments to be more effective enforcers of Articles 101 and 102 TFEU falls within the ambit of Article 103(1) TFEU as it is conducive to enduring the full effectiveness of the competition rules."*⁹¹⁹

⁹¹⁷ Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 22 March 2017, COM (2017) 142 final.

⁹¹⁸ Ibid, p. 5.

⁹¹⁹ Ibid.

However, according to the Commission

“this legal basis does not itself suffice, because both the aim and the content of the proposed Directive transcend this legal basis. The proposed Directive has an independent objective of seeking to bolster the functioning of the internal market by (1) talking national rules which prevent NCAs from being effective enforcers thereby creating more equal protection of companies and consumers in Europe; (2) ensuring that the same guarantees and instruments are in place for national competition law when it is applies in parallel to Articles 101 and 103 TFEU to ensure legal certainty and level playing field; and (3) putting in place effective rules on mutual assistance to safeguard the smooth functioning of the internal market and the system of close cooperation within the ENC.”⁹²⁰

According to the Commission the pursuit of the two-fold policy, *one relating to the effective application of EU competition policy and the other to the proper function of the internal market (...) are inextricably linked [as] ensuring that NCAs are empowered to be effective enforcers necessarily means legislating to remove obstacles in national laws that result in uneven enforcement thereby distorting competition in the internal market.*

That is why the Commission considers that

“These interdependent, though distinct aims, cannot be pursued separately through the adoption of two different instruments. For instance, it is not feasible to spilt the proposed Directive into a first instrument, based on Article 103 TFEU which provides NCAs with the means and instruments they need to apply Articles 101 and 102 TFEU, and a second, based on Article 114 TFEU, that requires Member States to provide for the same rules for the application of national competition law when it is applied in parallel to the EU competition rules. For these reasons, the proposal is also based on Article 114 TFEU.”⁹²¹

The ECN+ Directive proposal contains proposals of procedural nature, such as rules on leniency, rights of defence of the parties to an investigation, rules on independence of national competition authorities regarding its resources and power to establish priorities as well as investigative powers. However, it also contains substantive concepts with a view to

⁹²⁰ Ibid.

⁹²¹ Ibid. p. 7.

harmonising national competition laws. That is the case of the concept of the notion of “undertaking” for the purpose of Article 101 and 102 TFEU:

“To ensure the effective and uniform application of Articles 101 and 102 TFEU, the notion of undertaking, as contained in Articles 101 and 102 TFEU, should be applied in accordance with the case law of the Court of Justice of the European Union as designating an economic unit, even if it consists of several legal or natural persons. Accordingly, NCAs should be able to apply the notion of undertaking to find a parent company liable, and impose fines on it, for the conduct of one of its subsidiaries where such a parent company and its subsidiary form a single economic unit. To prevent undertakings escaping liability for fines for infringements of Articles 101 and 102 TFEU through legal or organisational changes, NCAs should be able to find legal or economic successors of the undertaking liable, and to impose fines on them, for an infringement of Articles 101 and 102 TFEU in accordance with the case law of the Court of Justice of the European Union.”⁹²²

The need for this provision came from the fact that in some jurisdiction, such as Germany, the addressee of a fine under the German law is a legal person. Therefore, the action of a representative of another legal entity, even if it is a member of the same economic unit in EU terms, may not be attributed to another legal person, such as the parent of the company. The German national competition authority was nevertheless holding the parent company indirectly liable for an infringement committed by its subsidiary under its supervisory duty of its subsidiaries’ activities. This was because Article 130 of German Administrative Offenses Act establishes a duty on the representatives of a company to supervise its work force so that the company complies with its legal obligations. Though it can be argued that the fining of a parental company failing to fulfil supervisory obligations within a group of undertakings has a similar function to the European concept of parental liability, it is recognised that “the German law still falls short of the European enforcement system.”⁹²³ First, the parental liability is for the breach of a supervisory power, not for the breach of competition law. Second, it can be more difficult to establish a breach of the supervisory duty than to establish

⁹²² Ibid, paragraph 31 p. 26.

⁹²³ Konrad Ost, 'From Regulation 1 to Regulation 2: Enforcement of EU law by national sanctioning regimes and the need for further convergence ' (2016) European Competition Law Annual 2013 31, 35.

the existence of an economic unit. Finally, the interpretation of the Bundeskartellamt regarding the supervisory duty of the parent company has repeatedly be challenged and therefore there is no certainty that it can stand in the future.⁹²⁴ This situation however seems to have been addressed in the recent reform of German Competition Act.⁹²⁵

It could be argued that the Commission's proposal relates to procedure, not substance. However it is submitted that a rule which enables substantial penalties and liabilities on entities that would not otherwise be liable has an effect on legal rights and obligations and thus is of substantive nature.

As previously submitted, Article 114 TFEU cannot serve as legal basis to harmonising national competition laws. First and foremost, in *Spain and Italy v Council*⁹²⁶ the CJEU makes it clear that rules attached to the objectives set out in Article 26 TFEU, such those adopted under Article 114 TFEU are not competition rules necessary for the functioning of the internal market. Second, the constitution limits affirmed by the CJEU to the powers under Article 114 TFEU are relevant here. The first limit requires that the EU harmonise national laws, by replacing them and not creating parallel rights. Member States have exclusive competence to legislate on competition matters that are purely national, and that as such, are not necessary for the functioning of the internal market. Consequently, harmonisation measures must leave unchanged the national law applicable to the situations that are under the exclusive competence of the Member States. The notion of "undertakings" for the purpose of applying Articles 101 and 102 TFEU coexists with the notion of "undertakings" for applying national competition law to situations that are national. The concept being the same is due to the choice of the national legislator, and is not indicative of EU law having the power to

⁹²⁴ Ibid, 36.

⁹²⁵ 9th amendment to the *Gesetz gegen Wettbewerbsbeschränkungen*, approved on the 31st of March 2017, that introduced the EU notion of "undertaking" for the purpose of Articles 101 and 102 TFEU.

⁹²⁶ Judgment of 16 April 2013, *Spain and Italy v Council*, Joined cases C-274/11 and C-295/11, EU:C:2013:240.

harmonise the test. Otherwise there would be a violation of the principle of conferral, as the exclusive competence of the Member States in respect of national matters would not be respected.

Furthermore, the requirement that there must be an appreciable distortion of competition and that EU legislation shall contribute to the elimination of obstacles to free movement or distortions of competition, is also not fulfilled. The ECN+ Directive does not eliminate possible distortions of competition between Member States, as it left unchanged the possibility for Member States to have more restrictive national competition laws. The use of Article 114 TFEU as legal basis for a legislative act in EU competition law in general and for the ECN+ Directive in particular is thus set aside.

A legislative initiative that covers substantive principles of EU competition law must be taken in the use of EU residual competence under Article 352 TFEU. An act adopted under Article 352 TFEU requires unanimity to be approved. Unanimity protects diversity more than the vote by qualified majority required under Article 114 TFEU.

There is however a good argument against the use of a legislative act to harmonise the concept of “undertaking” for the purpose of applying Articles 101 and 102 TFEU under national laws. The notion of “undertaking” for the purpose of applying Articles 101 and 102 TFEU is an autonomous concept of EU law. As specifically mentioned in the ECN+ Directive:

The concept of "undertaking" in EU competition law is established by the case law of the European Court of Justice. It means that different legal entities belonging to one "undertaking" can be held jointly and severally liable for any fines imposed on such "undertaking".⁹²⁷

Where national administrations, such the national competition authorities, fail to apply EU law, this is a breach of the duty of loyal cooperation under Article 4(3) TEU. This is ground

⁹²⁷ Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, p. 17.

for infringement proceedings under Article 258 TFEU. Therefore, the use of Article 352 TFEU is excluded in order to introduce a harmonised concept of “undertaking” for the purpose of applying Articles 101 and 102 TFEU. The EU has the necessary powers under Article 258 TFEU to compel Member States to comply with their obligations under EU law. Therefore, there is no space for a legislative act either under Article 114 TFEU or under Article 352 TFEU. The EU may take action under Article 114 TFEU only if a more specific legal basis for action is not available. Article 258 TFEU is a more specific legal basis than Article 114 TFEU, as it deals specifically with the situation of infringement by the Member States of their duty of loyal cooperation. Furthermore, the EU can use its residual competences under Article 352 TFEU to “attain one of the objectives set out in the Treaties and the Treaties have not provided the necessary powers.” The EU has been granted enforcement powers under Article 258 TFEU that allow it to address this situation. Therefore, the possibility for the EU to use its residual powers under Article 352 TFEU is also excluded.

The risk of allowing ECN+ Directive to have Article 114 TFEU also as a legal basis is that it creates a precedent for other legislative initiatives regarding substantive principles in EU competition law to be taken under that provision. Article 114 TFEU would be transformed in to an “instrument of general governance.” This would represent a serious and systematic violation of the principle of conferral.

4. Replacing vertical coordination by multilateral coordination

The possibility for regulatory competition in EU competition law has been established, both at legislative and executive level. Power remains shared. Softer models of regulatory competition, such as “regulatory co-operation” and “co-ordinated diversity” have been presented as more beneficial particularly as regards EU competition law.

Both require a degree of cooperation and coordination among government levels. As stated by Townley, “[t]he aim is to encourage sufficiently commonality and expertise while simultaneously encouraging experimentation and accepting diversity in EU competition law and other areas too.”⁹²⁸ It has been shown in more detail that Regulation 1/2003 contains mechanisms of control and coordination regarding the enforcement of EU competition law by the Commission and by the Member States. However, depending at what level the enforcement takes place, these mechanisms vary considerably, in favour of a centralised vertical coordination by the Commission. When the enforcement of Articles 101 and 102 TFEU takes place at national level, national competition authorities must notify the draft decision to the Commission, that can deliver an opinion.⁹²⁹ The opinion is not binding on the national competition authorities. However, under Article 11(6) Regulation 1/2203 the Commission can relieve national competition authorities from their competence to enforce Articles 101 and 102 TFEU by opening proceedings to investigate the same infringement. There is also the possibility for multilateral coordination. Article 14(7) of Regulation 1/2203 establishes the possibility of an advisory committee to be called on a case being dealt with by a national competition authority, by the initiative of a national competition authority or the Commission. In such situation, the Advisory Committee does not issue opinions on cases dealt with by competition authorities of the Member States.

When the enforcement takes place at EU level, there are some coordination mechanisms as well. Article 14(1) of Regulation 1/2003 establishes the obligation of the Commission to consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to the taking of decisions on individual cases under Articles 101 and 102 TFEU. The Advisory Committee delivers a written opinion on the Commission’s preliminary draft decision that

⁹²⁸ Townley, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)', 198.

⁹²⁹ Article 11(4) Regulation 1/2003.

shall be taken under utmost account by the Commission. The Commission shall inform the Committee of the manner in which its opinion has been taken into account.⁹³⁰ The Advisory Committee may also recommend the publication of the written opinion, that shall be carried out by the Commission. An Advisory Committee can also be called at the request of a national competition authority of a Member State in respect of a case where the Commission intends to initiate proceedings with the effect of Article 11(6) Regulation 1/2003.⁹³¹ The opinion of the Advisory Committee is not binding on the Commission that can take a decision under Article 11(6) Regulation 1/2003 disregarding it.

Under the system of conferred powers as established by the Treaty of Lisbon, the Commission has no special standing when it comes to the enforcement and development of EU Competition policy. Executive competence is shared and so it is the legislative competence to establish substantive principles of EU competition law. Furthermore, a decision taken at national level corresponds better to the principle that action should be taken as close as possible to the citizens, in accordance to the principle of subsidiarity. A multilevel mechanism of coordination corresponds better to this constitutional reality than a vertical system centralised in the Commission. The Advisory Committee is a multilateral mechanism of control and coordination. It allows all the parties with shared competence to have a close participation in the coordination of the enforcement and implementation of EU competition law. Diversity and experimentalism are more easily accepted when all parties have a chance to comment on the final outcome.

The following changes to the current system under Regulation 1/2003 should be implemented.

⁹³⁰ Article 11(3) and (5) Regulation 1/2003.

⁹³¹ Article 14(7) Regulation 1/2003.

A decision of the Commission to initiate proceedings under Article 11(6) TFEU, when opposed by the national authorities concerned, should be always subject to an Advisory Committee whose opinion should be binding on the Commission. Furthermore, where the Commission deems necessary to enact an opinion on a draft decision of a national competition authority, that opinion should be given by the Advisory Committee and not the Commission. For the sake of efficiency, it is reasonable to have a centralised system of notification of draft national decisions enforcing Articles 101 and 102 TFEU to the Commission. However, after the triage, when the Commission identifies a situation that would require the issue of an opinion, the Commission should call an Advisory Committee to deliver it.

5. Radical measures to achieving diversity

Two radical measures for achieving diversity can be envisaged by Member States. One is the use of enhanced cooperation pursuant to Article 20 TEU to develop EU competition law and policy. The competence to legislate on substantive principles of EU competition law is shared. Therefore, the possibility for an initiative of enhanced cooperation by Member States in the area of competition would not be set aside.⁹³² For example, a group of Member States⁹³³ could establish enhanced cooperation for control of minority shareholding. The decision-making under close cooperation is restricted to the participating Member State that would be responsible for the development of the substantive content of EU competition policy in that area. The acts adopted in the framework of enhanced cooperation only bind those Member States.⁹³⁴

⁹³² Article 329(1) TFEU.

⁹³³ Minimum 9 Member States, see Article 20(2) TEU.

⁹³⁴ Article 20(4) TEU.

The second radical way to achieve diversity would be the suspension of Regulation 1/2003 in general or regarding an economic sector in particular. As confirmed by the CJEU, in the absence of implementing measures under Article 103 TFEU, Articles 101 and 102 TFEU are enforced according to the system envisaged by Articles 104 and 105 TFEU. This is because Articles 101 and 102 TFEU are directly applicable and the Treaty establishes the enforcement system directly. The enforcement of the EU competition principles under those articles is not dependent on an implementing measure. Under the enforcement system established by primary law, when the Commission finds an infringement of Articles 101 and 102 TFEU can only “propose appropriate measures to bring it to an end.”⁹³⁵ The Commission cannot impose any pecuniary sanction. The enforcement of EU competition law would be mainly subject to the priorities of Member States. Moreover, under Article 104(1) TFEU, Member States “shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.” There is no requirement under the Treaties for the national competition law to be harmonised with EU competition law. This means that, on the one hand, the enforcement would be subject to the priorities of the Member States. Different priorities of enforcement secure diversity. On the other hand, if under national law a certain type of behaviour falling within the prohibitions of Articles 101 or 102 TFEU is not prohibited, Member States will not enforce EU competition law. This is because under Article 104(1) TFEU they are required to apply EU competition law when they enforce national competition law. When there is no of national law, Member States do not need to open proceedings to enforce it. As such, the enforcement of Articles 101 and 102 TFEU will also be excluded. This would be the ultimate way of introducing diversity in EU competition law, quickly and in a manner fully compatible

⁹³⁵ Article 105(2) TFEU.

with the Treaties. This can be useful as, in solving conflicts in EU competition law, time is of the essence.

6. Future research work

Having set the case for diversity in EU competition law, there are several possible lines of future research work that deserve to be developed. Some topics of particular interest are:

- (i) the discussion on whether diversity in EU competition law is desirable;
- (ii) the debate on possible limits to the application of national competition laws steaming from the internal market freedoms;
- (iii) the discussion on the role national competition laws play in the fuctionaing of the internal market, and
- (iv) the development of new a new legal and institutional framework for cooperation between national competition authorities and the Commission regarding the enforcement of EU competition law alternative to Regulation 1/2003.

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